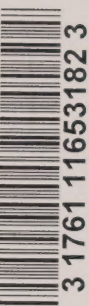


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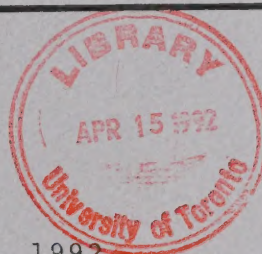


Ontario

ENVIRONMENTAL ASSESSMENT BOARD

VOLUME: 365

DATE: Tuesday, March 31, 1992



BEFORE:

A. KOVEN Chairman

E. MARTEL Member

FOR HEARING UPDATES CALL (COLLECT CALLS ACCEPTED) (416)963-1249

EARR
ASSOCIATES &
REPORTING INC.

(416) 482-3277

2360 Yonge St., Suite 709, Toronto, Canada M4P 1E4

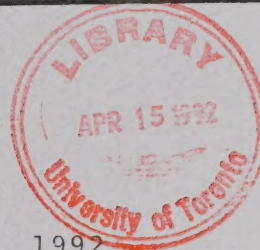
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2300 Yonge St., Suite 709, Toronto, Canada M4P 1E4

HEARING ON THE PROPOSAL BY THE MINISTRY OF NATURAL
RESOURCES FOR A CLASS ENVIRONMENTAL ASSESSMENT FOR
TIMBER MANAGEMENT ON CROWN LANDS IN ONTARIO

IN THE MATTER of the Environmental
Assessment Act, R.S.O. 1980, c.140;

- and -

IN THE MATTER of the Class Environmental
Assessment for Timber Management on Crown
Lands in Ontario;

- and -

IN THE MATTER of a Notice by The Honourable
Jim Bradley, Minister of the Environment,
requiring the Environmental Assessment
Board to hold a hearing with respect to a
Class Environmental Assessment (No.
NR-AA-30) of an undertaking by the Ministry
of Natural Resources for the activity of
Timber Management on Crown Lands in
Ontario.

Hearing held at the offices of the Ontario
Highway Transport Board, Britannica Building,
151 Bloor Street West, 10th Floor, Toronto,
Ontario, on Tuesday, March 31st, 1992,
commencing at 9:00 a.m.

VOLUME 365

BEFORE:

MRS. ANNE KOVEN
MR. ELIE MARTEL

Chairman
Member

A P P E A R A N C E S

MR. V. FREIDIN, Q.C.	)	MINISTRY OF NATURAL
MS. C. BLASTORAH	)	RESOURCES
MS. K. MURPHY)	
MR. B. CAMPBELL)	
MS. J. SEABORN	)	MINISTRY OF ENVIRONMENT
MS. N. GILLESPIE)	
MR. R. TUER, Q.C.	)	ONTARIO FOREST INDUSTRY
MR. R. COSMAN	)	ASSOCIATION and ONTARIO
MS. E. CRONK	)	LUMBER MANUFACTURERS'
MR. P.R. CASSIDY	)	ASSOCIATION
MR. D. HUNT)	
MR. R. BERAM		ENVIRONMENTAL ASSESSMENT BOARD
MR. J.E. HANNA	)	ONTARIO FEDERATION
DR. T. QUINNEY	)	OF ANGLERS & HUNTERS
MR. D. O'LEARY	)	and the NORTHERN ONTARIO TOURIST OUTFITTERS ASSOCIATION
MR. D. HUNTER	)	NISHNAWBE-ASKI NATION
MR. M. BAEDER	)	and WINDIGO TRIBAL COUNCIL
MS. M. SWENARCHUK	)	FORESTS FOR TOMORROW
MR. R. LINDGREN)	
MR. D. COLBORNE	)	GRAND COUNCIL TREATY #3
MR. G. KAKEWAY)	
MR. J. IRWIN		ONTARIO METIS & ABORIGINAL ASSOCIATION
MS. M. HALL		KIMBERLY-CLARK OF CANADA LIMITED and SPRUCE FALLS POWER & PAPER COMPANY

APPEARANCES (Cont'd):

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MR. R. BARNES)	ASSOCIATION
MR. L. GREENSPOON)	NORTHWATCH
MS. B. LLOYD)	
MR. J.W. ERICKSON, Q.C.)		RED LAKE-EAR FALLS JOINT
MR. B. BABCOCK	)	MUNICIPAL COMMITTEE
MR. D. SCOTT	)	NORTHWESTERN ONTARIO
MR. J.S. TAYLOR	)	ASSOCIATED CHAMBERS OF COMMERCE
MR. J.W. HARBELL		GREAT LAKES FOREST
MR. S.M. MAKUCH		CANADIAN PACIFIC FOREST PRODUCTS LTD.
MR. D. CURTIS	)	ONTARIO PROFESSIONAL
MR. J. EBBS	)	FORESTERS ASSOCIATION
MR. D. KING		VENTURE TOURISM ASSOCIATION OF ONTARIO
MR. H. GRAHAM		CANADIAN INSTITUTE OF FORESTRY (CENTRAL ONTARIO SECTION)
MR. G.J. KINLIN		DEPARTMENT OF JUSTICE
MR. S.J. STEPINAC		MINISTRY OF NORTHERN DEVELOPMENT & MINES
MR. M. COATES		ONTARIO FORESTRY ASSOCIATION
MR. P. ODORIZZI		BEARDMORE-LAKE NIPIGON WATCHDOG SOCIETY



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APPEARANCES (Cont'd):

MR. R.L. AXFORD

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MR. M.O. EDWARDS

FORT FRANCES CHAMBER OF
COMMERCE

MR. P.D. McCUTCHEON

GEORGE NIXON

MR. C. BRUNETTA

NORTHWESTERN ONTARIO
TOURISM ASSOCIATION

I N D E X O F P R O C E E D I N G S

<u>Witness:</u>	<u>Page No.</u>
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<u>MICHAEL McGUIRE,</u>	
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I N D E X O F E X H I B I T S

<u>Exhibit No.</u>	<u>Description</u>	<u>Page No.</u>
2164	Witness statement No. 4 filed on behalf of OMAA.	63453
2165	20 photographs to which Mr. King will be referring.	63454

1 ---Upon commencing at 9:05 a.m.

2 MADAM CHAIR: Good morning. Please be
3 seated.

4 Good morning, Mr. Irwin.

5 MR. CASSIDY: I have just been advised
6 this is Volume 365.

7 MADAM CHAIR: That's right, Mr. Cassidy.

8 MR. MARTEL: That's right. One year.

9 MR. IRWIN: It is going to become the
10 Martel memorial library eventually if you die on the
11 job. It's possible.

12 MR. MARTEL: You want to be well ensured
13 when you start a job like this.

14 MADAM CHAIR: Good morning, gentlemen.

15 HECTOR KING,
16 MICHAEL McGUIRE,
17 PATRICK McGUIRE; Sworn
 ARTHUR R. ELLIOTT; Resumed

18 MR. IRWIN: Madam Chair, I have three
19 witnesses in the last panel. Mr. Hector King who is
20 Chairman of the Northern District School Board area in
21 Armstrong, President of the Armstrong Metis
22 Association, past President of the Northwestern Ontario
23 Veteran's Association, former member of the Corp of the
24 Canadian Commissioners and U.S. commissioners.

25 He is a former gunner in the tank corp of

1 the Canadian army in World War II, saw action in World
2 War II, and several other formers. He is considered an
3 elder in the Metis association.

4 Beside him is Mr. Mike McGuire and I
5 think I have Mr. McGuire's resume. I only have the one
6 copy that Mr. McGuire gave me this morning.

7 For the record he is presently President
8 of the Lake Nipigon Metis Association, present Director
9 of the Nipigon Aboriginal Peoples Alliance and at least
10 a half a dozen former positions dealing with the
11 Ontario Metis Association in various capacities and at
12 various locals.

13 MADAM CHAIR: Thank you, Mr. Irwin.

14 Did we receive Mr. Michael McGuire's
15 resume before?

16 MR. IRWIN: No, you didn't. We just
17 received that last night.

18 Beside him is Mr. Patrick McGuire. A
19 founding member of the East Lake Nipigon community. He
20 gave evidence once before in Thunder Bay on aboriginal
21 rights and usage of land with another panel at that
22 time. I believe you have his qualifications from that
23 panel.

24 One unique thing about the two McGuire
25 brothers is they are Metis, huge family, the McGuire

1 family, and the brother is the Chief of the reserve.
2 So it gives you an idea of how the McDermitt society
3 works as far as Metis. It's a very fine distinction
4 within the same family. The chief is...

5 MADAM CHAIR: Mr. Irwin, shall we add Mr.
6 Michael McGuire's resume to Exhibit 2156 which contains
7 the resumes of your other witnesses?

8 MR. IRWIN: Thank you.

9 MADAM CHAIR: Are we going to be using
10 part of witness statement No. 4, Mr. Irwin?

11 MR. IRWIN: They will be addressing as
12 our last evidence appendix B which was prepared by the
13 Armstrong Metis in witness statement No. 4.

14 MADAM CHAIR: Let's give witness
15 statement No. 4 an exhibit number. Exhibit 2164 will
16 be the written evidence titled Witness Statement No. 4,
17 Building a Partnership for Resources Management and
18 Development, filed on behalf of OMAA.

19 ---EXHIBIT NO. 2164: Witness statement No. 4 filed on
20 behalf of OMAA.

21 MR. IRWIN: Mr. King brought with him on
22 this trip some photographs of the Armstrong area that I
23 have seen for the first time, and unfortunately I did
24 not have an opportunity to make copies for my friends.
25 If I may enter them as exhibits at this time subject to

1 proof of identification by Mr. King.

2 MADAM CHAIR: Thank you, Mr. Irwin.

3 These photographs, Mr. King will be
4 speaking to these photographs?

5 MR. IRWIN: Yes.

6 MADAM CHAIR: All right. Why don't we
7 give an exhibit number to the photographs and as Mr.
8 King refers to each photograph we will assign it A, B,
9 C.

10 MR. IRWIN: Thank you.

11 MADAM CHAIR: Exhibit 2165 is a
12 collection of 20 photographs to which Mr. King will be
13 referring and with each one we will assign it an
14 alphabet letter.

15 ---EXHIBIT NO. 2165: 20 photographs to which Mr. King
16 will be referring.

17 MR. IRWIN: I have asked Mr. Elliott to
18 join this group. Not to give evidence. He may give
19 some evidence on this just at the end of their evidence
20 dealing with the Armstrong evidence.

21 DIRECT EXAMINATION BY MR. IRWIN:

22 Q. Mr. King, you are heading up this
23 delegation so I want to deal with your background in
24 some detail. How old are you?

25 MR. KING: A. Sixty-nine and a half.

1 Q. When is your birthday?

2 A. September 22nd.

3 Q. How long have you been involved with
4 the Metis organization?

5 A. Since day one. I would say about 23
6 years now.

7 Q. 23 years. And I understand that you
8 are an elected official of the Educational Board in the
9 Armstrong area?

10 A. Yes, I'm the Chairman there.

11 Q. You're the Chairman. That means you
12 got the highest vote?

13 A. That's right.

14 Q. How many years have you been --

15 A. Well, I was on for eight and a half
16 and then I was off for three years and then I reran
17 again last fall and we got back in by a big majority.

18 Q. You lost by one vote and--

19 A. I lost three years ago, yes.

20 Q. --came back with a two to one --

21 A. Yes. Half white and half Indian
22 board.

23 Q. Is that right?

24 A. Yes.

25 Q. Now, you were a member of the

1 Canadian Armed Forces; is that correct?

2 A. Yes, for 40 years. Yes, in North
3 Africa, Italy, France, Holland.

4 MADAM CHAIR: Excuse me, Mr. Irwin. The
5 court reporter is having difficulty hearing Mr. King.
6 So perhaps we could get you to speak up a little, Mr.
7 King.

8 MR. KING: Okay.

9 MR. IRWIN: You won't believe this, but
10 Mr. King is speaking slowly. Last night he was making
11 a concerted effort to speak slowly. Last night we went
12 over this and Mr. King is speaking about half his
13 normal speed right now. He has a lot to say.

14 Q. I understand you were a gunner in the
15 tank corp?

16 MR. KING: A. Yes, I was a gunner in the
17 tank corp.

18 Q. What things have you done within what
19 positions have you held? What things have you done
20 within the Metis organization?

21 A. I was one of the co-founders of the
22 Metis organization.

23 Q. One of the co-founders. When was
24 that?

25 A. Well, mine basically was in education

1 in Armstrong where the Treaty Indians weren't allowed
2 to go to school with the Metis at that time.

3 MR. MARTEL: You are going to have to
4 speak louder.

5 THE COURT REPORTER: You are going to
6 have to speak slower.

7 MR. KING: What parts didn't you get?

8 MR. IRWIN: We didn't get any of it.

9 MR. KING: We will start all over again.
10 I was with the (inaudible) regiment. It's a French
11 Canadian regiment. That's how I got in there. I
12 joined up in Thunder Bay, but I went to Quebec. So
13 that's where I got into the regiment.

14 MR. IRWIN: Q. As a Commissioner, did
15 you have anything to do with toxic chemicals?

16 MR. KING: A. Well, on the main gate I
17 generally issued the keys. The keys had been taken
18 from the personnel who were putting toxics on the
19 basis. They kill mosquitoes, that was the general
20 idea, and it did kill them.

21 Q. What he said was that the toxic
22 chemicals killed the mosquitoes.

23 MADAM CHAIR: All right.

24 MR. IRWIN: He was the Commissioner at
25 the--

1 MR. KING: Main gate.

2 MR. IRWIN: --main gate at the --

3 MR. KING: Radar base in Armstrong.

4 MR. IRWIN: Q. Which base was that?

5 A. The radar base in Armstrong. Yes,
6 the Royal Canadian Armed Forces.

7 Q. When did this close?

8 A. 1977, I believe. Around there.

9 Q. 1977. Okay. As a result of those
10 things you took note of in the Armstrong area this
11 brief was presented by the Armstrong Metis, and maybe I
12 could deal with it point by point.

13 You have a complaint about the MNR
14 strategy as far as the Great West Timber Ltd. What was
15 that complaint?

16 A. Well, that was --

17 Q. Take your time. We have got all
18 morning.

19 A. Okay. The main concern was, after
20 the radar base closed what were Indians going to do in
21 Armstrong. By the way, I am a voted member in the
22 Chamber of Commerce.

23 One instance in particular -- by the way,
24 I'm also an outreach officer obtaining jobs for native
25 people.

1 Q. You are presently on outreach
2 officer?

3 A. Yes.

4 MADAM CHAIR: It might help, Mr. Irwin,
5 for the court reporter, if you could summarize or
6 repeat portions of what Mr. King is saying.

7 MR. IRWIN: I will try.

8 Q. You are presently an outreach
9 officer?

10 MR. KING: A. Yes, with the Armstrong
11 Metis Association.

12 MADAM CHAIR: For the Armstrong Outreach
13 Association?

14 MR. KING: Yes, it's just something on
15 the side line, you know.

16 MR. IRWIN: Q. Something on the side
17 line?

18 MR. KING: A. Jobs for native people is
19 what it means. It's not a very good success. It's not
20 that I'm not doing my work, but it's just they won't
21 hire native people in Armstrong.

22 Q. What does this have to do with Great
23 West Timber?

24 A. Well, when that (inaudible) came out
25 by Jack Stokes it was suppose to have been the jobs for

1 native people and Jack Stokes right off the bat
2 mentioned it and he said: The Indian people are going
3 to be left out of this. True enough, it happened.

4 Most of the people came from eastern
5 Ontario to come in and cut the pulp. There was one
6 native person, one Metis who got a job out of the whole
7 thing.

8 Q. How many Metis are there in that
9 particular area?

10 A. Well, in my membership alone there
11 are 71. We don't count the 18 year old or 16 or 15.
12 We don't count them.

13 MADAM CHAIR: So there were 78 --

14 MR. KING: 71.

15 MADAM CHAIR: --71 Metis people who were
16 looking for employment.

17 MR. KING: That's correct.

18 MR. MARTEL: That's with one company?

19 MR. KING: Great West, Domtar. It's now
20 P.C. Forest Products which was Great Lakes Paper. Now
21 it's known as P.C. Forest Products.

22 MR. IRWIN: Q. Okay. Did you complain
23 at all?

24 MR. KING: A. Well, I went directly to
25 the official employment officer. Well, what he always

1 told me was that they didn't have no skidder, they
2 didn't have no trucks or anything like that, you've got
3 to supply your own equipment.

4 That is one of the things that held the
5 native people back, but the main concern was, what held
6 them back was that they weren't going to work 16 hours
7 a day, seven days week. There was just no way.

8 Q. Okay. So you're saying that they
9 wanted these 16-hour days?

10 A. Yes.

11 Q. And they wanted people with
12 equipment, okay?

13 A. Yes.

14 Q. And the Metis were not prepared to
15 work 16 hours a day?

16 A. No.

17 Q. And a lot of them didn't have
18 equipment?

19 A. Correct.

20 Q. Okay. Now, dealing with the
21 equipment. Is there any solution in your mind or any
22 policy that would help them with the equipment?

23 A. The Ontario Metis and Aboriginal
24 Association has a development corporation, but they
25 were no help either.

1 Q. So you have OMAA, the development
2 corporation wasn't able to help and you have no
3 government policy was -- there was no government policy
4 of assistance, so consequently there were very few
5 Metis with equipment; is that correct?

6 A. That's right.

7 Q. Okay. Now, you also write about the
8 lack of Metis and native people acting as tourist
9 outfitters. Let's take this from guiding.

10 How does this work? If I come into your
11 area, how does the work and how much are you paid as a
12 Metis person? What's the method of you getting
13 employment?

14 A. Well, first of all, I guided on Lake
15 Nipigon and I was well paid, but in Armstrong, most of
16 those Indians can't speak English and they are hired.

17 Well, the bad part about this is that not
18 all operators are doing this. Some of them are doing
19 it. They hire them, they take them out on an airplane,
20 they charge them for the airplane to take them to work
21 plus the tourist, you know.

22 Q. So the outfitter hires the Metis at
23 Armstrong?

24 A. And the status group too.

25 Q. And the status, okay. They are taken

1 out on a plane?

2 A. Yes.

3 Q. What do the Metis and the status
4 group, what do they do on this outfitting trip?

5 A. Well, I generally send them out
6 myself as an employment officer, but a lot of them come
7 back and they say: I didn't get paid. Then I have to
8 go through the -- not only to the Indian people. There
9 was one Frenchman there that never got paid. They
10 didn't get nothing.

11 We had a lot of trouble through the
12 Department of Labour and my boss got after me and said:
13 Well, you don't work for the Department of Labour.
14 That's their problem.

15 Q. Okay. Have either of the other two
16 witnesses gone out as guides?

17 MR. M. McGUIRE: A. (indicating)

18 Q. Explain what a Metis guide does?

19 A. Well, what we do is we go down to the
20 tourist establishment and we're assigned two people to
21 a boat. I'm the operator of the engine, the outboard
22 motor, and I have to know where to take them people to,
23 to where the fish are. When they catch a fish I've got
24 to take the fish off the hook for them.

25 When lunch times comes around, this is

1 about twelve o'clock or one o'clock or whatever time
2 anybody gets hungry, then we have what they call a
3 shore lunch. So we take the catch, the morning catch
4 into the shore and I have to clean the fish and fry
5 them up, make the fire, fry them up, fry up the
6 potatoes, open all the cans of beans if they wanted
7 beans. That's mostly what it consisted of anyway, the
8 shore lunch.

9 Then while those people are fooling
10 around and the tourists are just fooling around and
11 fishing off the shore and that during lunch hour and
12 some of them were wrestling in the back because three
13 camps met that day. So there were six people
14 altogether.

15 After that we had to clean up the -- my
16 job was to clean up the little place and put the
17 garbage away and stuff like this and the rest of the
18 day we took them back fishing until about -- I would
19 say about seven o'clock I guess, seven or eight o'clock
20 that evening.

21 Then the fish we caught during the
22 afternoon, after we got back to the tourist base my job
23 was to clean the fish and fillet the fish for them. We
24 had to leave a lit piece of skin on the fish so the
25 fish could be identified as pickerel or northern pike

1 or lake trout or whatever.

2 Then after that we had to clean up the
3 fish house and make sure all the garbage was put away
4 and that was just about a typical day.

5 Q. How many hours would that be by the
6 time you are finished?

7 A. We started at eight o'clock in the
8 morning. Like, if we left the tourist base at eight we
9 wouldn't get back there until around 8:30, 9:00 or
10 sometimes just before dark.

11 Q. What do you get paid for that?

12 A. I got paid \$20 a day.

13 Q. \$20 a day, okay. Now, that's below
14 the minimum wage. Why don't the Metis lay charges?

15 A. I guess we didn't know what the
16 minimum wage was for guiding.

17 Q. How do you get picked as a guide?

18 A. Well, usually there's families there
19 that are known -- different people know where the fish
20 are at certain times of the year.

21 Q. So no one hires you directly?

22 A. Nobody hires us directly.

23 Q. How do you get hired?

24 A. Well, if there's five of us standing
25 on the beach or whatever and the tourist operator comes

1 by and says I need you and you and you today. The
2 other guys, I will call you later if I need you.

3 MADAM CHAIR: Excuse me, did this take
4 place this year, Mr. McGuire, or...

5 MR. M. McGUIRE: No.

6 MADAM CHAIR: When were you doing this
7 work that you were referring to?

8 MR. M. McGUIRE: I don't remember the
9 exact year.

10 MADAM CHAIR: In the last five years?

11 MR. M. McGUIRE: A little bit longer than
12 five years.

13 MR. IRWIN: Q. Okay. You have a
14 proposal in your brief that guides be graded, first,
15 second and third. How would that work? How would that
16 work so the protection --

17 MR. KING: A. A lot of guides don't know
18 how to, just like Mike was talking about, don't know
19 how to cook shore lunches. You know, personal hygiene
20 and all that. A lot of them don't know how to fillet a
21 fish and do cooking and all that.

22 So you would grade them. Start them off
23 as No. 3, then No. 2 and No. 1. It never did work. It
24 was sent to all tourist camps and it never did work.
25 MNR got it. They are the first ones to get the copy,

1 is the MNR. You've got to handle small motors and a
2 lot of them are not mechanics.

3 MR. IRWIN: Mr. Martel?

4 MR. MARTEL: Yes, I just want to know,
5 how would you determine the level at which -- who would
6 do that, the determination of the level of skills owned
7 by 3, 2 and 1?

8 MR. KING: Well, I just thought to ask
9 Chief Doug (inaudible) of the White Sand Band. He's
10 running for president of the Guiding Association and he
11 did look at that brief. That's what I told him, the
12 very thing as I told Mr. counsel there, and he said it
13 was a good idea and he is a good PR.

14 MR. MARTEL: Who would make the decision?
15 It is like any other job. How would you decide that
16 Mike McGuire was a No. 1 and Pat McGuire was No. 2 in
17 terms of skills?

18 MR. KING: Well, the tourist operator
19 would mainly do that. He will take his best guides,
20 you know. The tourist operator will pick the best
21 guides.

22 MR. IRWIN: Q. Who would control this?
23 Who would test? Where would you keep the lists? How
24 would you control this?

25 MR. KING: A. Well, Douglas (inaudible)

1 I was just talking about, he is forming that Guiding
2 association.

3 Q. Will it be done by the association?

4 A. It will be done by the Guiding
5 Association. We used to be licensed at one time,
6 \$2.00, when we were on Lake Nipigon, \$2.00 a year and
7 now we don't pay. Something went wrong there because
8 there was a personal loss, a person there from the
9 status Indian...

10 Q. Let me move on to your next point. I
11 don't want to stay too long with that one.

12 Nishnawbe participation in forestry.
13 Now, you have a complaint that there is not much Metis
14 or status participation in the forestry. What do you
15 base that on?

16 A. Well, we had some contractors, some
17 backside jobbers in our area and they brought them
18 people from the eastern provinces and when a native
19 person went there - and I checked it out myself with my
20 wife's nephews - they got the poorest strip and other
21 people from eastern Ontario are getting the best.

22 These two boys did not drink or did not
23 smoke. I mean, you will find very few natives on that
24 one. They got stuck, nobody would pull them out. The
25 only thing is that they were Indians. That's all. The

1 boys just couldn't do it. They were stuck and they had
2 the poorest timber and everybody else had the best
3 timber.

4 Q. Mr. McGuire, Pat McGuire, you wanted
5 to add something to that?

6 MR. P. McGUIRE: A. No. I was just
7 laughing at the way he put it. It just struck me
8 funny.

9 MR. M. McGUIRE: A. I would like to add
10 to that, too. We had a nice one strip, a real nice
11 jack pine that we could possibly make some money on it,
12 and then the foreman come down and got me and he said:
13 I am going to give you a different strip, he says. I
14 said: Okay.

15 So he took me down to another strip where
16 Frank (inaudible) already went through and highgraded
17 that strip. He took all the big trees and all the jack
18 pine and all the spruce out of that and all that was
19 left there was poplar. He says: You've got to cut
20 this strip here, but yet I had that other strip given
21 to me, that other strip, and they took that, my nice
22 strip, and then they gave it to the people from the
23 east.

24 Q. Now, you mentioned people from the
25 east twice. How is the hiring done? Who are we

1 talking about, Mr. Buchanan?

2 MR. KING: A. We're talking about Mr.
3 Buchanan and (inaudible) timber company. They change
4 their name at least once a year. I don't know why they
5 do it. By the time I find out who they are it's the
6 same guy but a different name.

7 Q. How do they do their hiring?

8 A. Well, I don't know how they do it. I
9 think they have some kind of an office down in Quebec
10 and New Brunswick and Newfoundland. Their friends will
11 tell them. Like, if I came up from Quebec, I will
12 phone my friend: Come on up there's a job here for
13 you. They bypass the outreach office. That's what
14 bothers me. They bypass the outreach office.

15 Q. How much of their hiring is done --

16 MR. FREIDIN: They bypass which office?

17 MR. IRWIN: The outreach office.

18 MR. KING: They bypass that.

19 MR. IRWIN: Q. How much of their hiring
20 is done out of the area?

21 MR. KING: A. Not very much. Not very
22 much.

23 Q. How much is done outside the area?

24 A. I would say about 99 per cent of it.
25 I gave you a figure of only one Metis, so that would be

1 99 per cent of their hiring is done outside.

2 Q. Okay. You mentioned
3 over-exploitation. I want to show you some pictures.
4 These were entered as one exhibit and they are going to
5 be done alphabetically. First, some small black and
6 whites. Exhibit A.

7 MADAM CHAIR: Exhibit 2165A.

8 MR. IRWIN: These will all be of that
9 exhibit.

10 MR. KING: This is where the clearcut is
11 here. The clearcutting.

12 MR. IRWIN: Do you want to come up here
13 and show it to the Board.

14 MADAM CHAIR: Excuse me. Mr. Freidin,
15 Mr. Cassidy, do you wish to see what we are doing up
16 here?

17 MR. FREIDIN: Yes.

18 MR. IRWIN: Exhibit A.

19 MR. KING: That's where they cut the
20 timber. Now, you will notice there's a green block
21 here. We tested that one out. It was green, it was
22 left behind. That's what they call clearcutting.

23 MR. IRWIN: Q. How long ago was this?

24 MR. KING: A. This was taken four years
25 ago off the Armstrong (inaudible) Road.

1 Q. How far is that from Armstrong?

2 A. About 24 miles.

3 Q. Exhibit B, what's that?

4 A. That's the clearcutting. That's
5 what's called deadwood. They don't pick that up.

6 Q. They just left that there?

7 A. They leave it there, yeah.

8 Q. Exhibit C. Are these all from the
9 same approximate area?

10 A. Yes, it's all from the same area.

11 This is where they picked the corns up
12 here. There's corn picking there after it was cut
13 down.

14 Q. Exhibit D shows a road with timber on
15 either side.

16 A. This is one that hurts the most.
17 See, all that wood was left behind.

18 Q. Who did that?

19 A. That's where cutting by (inaudible)
20 and Buchanan and all them.

21 Q. Which is left to rot there?

22 A. Yeah. Oh, it's not left to rot
23 there.

24 MADAM CHAIR: What year was that?

25 MR. KING: That's about five years or six

1 years when that was taken.

2 MADAM CHAIR: That wood was subsequently
3 picked up?

4 MR. KING: No, it's still there.

5 MADAM CHAIR: It is still in piles?

6 MR. KING: Yeah, still in piles. Lots of
7 it. Thousands and thousands of...

8 MADAM CHAIR: This is in the same
9 location 24 miles south of Armstrong?

10 MR. KING: Straight north of Armstrong.

11 MR. IRWIN: Q. Exhibit E --

12 MADAM CHAIR: Excuse me, Mr. Irwin. We
13 flew over most of the Armstrong management unit in
14 November.

15 MR. KING: Oh, yeah, I did see you over
16 there.

17 MADAM CHAIR: And we didn't see piles
18 like this along the roadside.

19 MR. KING: Can I ask you a question then?

20 MADAM CHAIR: Sure, go ahead.

21 MR. KING: Who flew you?

22 MADAM CHAIR: We were flown by an MNR
23 helicopter.

24 MR. KING: That's what I want. I knew
25 about it.

1 MADAM CHAIR: So you are convinced that
2 this wood still exists?

3 MR. KING: All over, yes. All over the
4 place.

5 MADAM CHAIR: When was the last time you
6 were here?

7 MR. KING: I trap there in the fall.

8 MADAM CHAIR: So you were at this
9 location last fall?

10 MR. KING: Oh, yeah, I passed by it.
11 Hunting, yes, when I went hunting.

12 MADAM CHAIR: And this wood was in piles?

13 MR. KING: We can take it for firewood.
14 They don't charge us a cent for it. We can take all
15 the wood we want.

16 MR. IRWIN: Q. Exhibit E, how would is
17 that one?

18 MR. KING: A. They're all same. See the
19 clearcutting.

20 Q. Exhibit F is a picture of you?

21 A. Yes.

22 Q. Why?

23 A. Well, what I'm concerned about is --
24 you will notice my arms are pretty long. They are not
25 that short. That's how high that stump is. That was

1 cut by this coring machine. Coring machines they call
2 them. See how high it is.

3 MR. MARTEL: Could I just see that one.

4 MR. KING: These were taken last week.
5 No, I mean them coloured ones.

6 MADAM CHAIR: This was F and you should
7 now have G, Mr. Irwin.

8 MR. IRWIN: Q. Exhibit G, is that --

9 MR. KING: A. They widened the road from
10 Armstrong to the airport which is about some six, seven
11 miles up to nine miles.

12 Well, during the contract they didn't
13 have the equipment, so one of the jobbers took the
14 contract. They just cut the trees and piled them on
15 the side of the highway. They were there for a couple
16 of days, they didn't move them. So people in Armstrong
17 were cutting it for fuel wood. Some of it is still
18 there. Most of it is still there yet. They just took
19 the bottom parts, the good parts.

20 Q. Most of this wood is still here?

21 A. The tops are there. It's a fire
22 hazard for one thing.

23 Q. Exhibit H is more the same?

24 A. See, the poplar trees up there.
25 That's why we took this picture. In the spring time

1 the buds go out and if they did replant -- they did
2 replant all over, but it chokes those little jack pine.
3 Poplar, they grow faster. So that's why we took that
4 picture. That's poplar and birch, you know.

5 MR. FREIDIN: Which one was that?

6 MADAM CHAIR: Exhibit 2165H.

7 MR. IRWIN: Q. Exhibit I, what's that?

8 MR. KING: A. That's the same as the
9 previous one. Them trees are still there.

10 MADAM CHAIR: What's your complaint about
11 this photograph with the stand of poplar?

12 MR. KING: In the springtime when they
13 have their little buds, before the leaves come out they
14 will drop. The seed will drop and then they choke the
15 little jack pine if they replanted, and they replanted
16 all over that. They choke up the jack pine, the main
17 trees.

18 MADAM CHAIR: You think that poplar
19 should be removed?

20 MR. KING: It should be taken down, yes.

21 MR. IRWIN: Q. When were these taken?

22 MR. KING: A. Last May.

23 Q. Last May?

24 A. They were taken from my car at about
25 90 miles an hour.

1 Q. How far from Armstrong?

2 A. From Armstrong to Thunder Bay.

3 That's the new cutting.

4 Q. How far out of Armstrong?

5 A. 258 kilometres.

6 Q. From Armstrong?

7 A. Yeah. This is just a little piece.

8 I didn't exactly get the mileage of where it was taken.

9 Q. What does J show?

10 A. They took all the big stuff and left
11 the little stuff there. Just little stuff.

12 MADAM CHAIR: One moment, Mr. Irwin.

13 Mr. King did say that Exhibit I is exactly the same
14 photograph as Exhibit G.

15 MR. KING: Yeah.

16 MR. MARTEL: Those are residuals, they
17 call them.

18 MR. KING: They were taken from a car.

19 MADAM CHAIR: Excuse me. What is your
20 point about this photograph, Mr. King, Exhibit 2165J?

21 MR. KING: They just took the big trees
22 out. Notice in the back there are a few spruce there,
23 very small spruce. They'd be about this size maybe.
24 (indicating) Too small to cut. That's reforestation,
25 I guess. That's the way they're looking at it.

1 MR. IRWIN: Q. Exhibit K?

2 MR. KING: A. Like I said, that's taken
3 from the car.

4 Q. What's the problem with this one?

5 A. They clearcut there.

6 Q. Okay. And Exhibit L is basically the
7 same thing?

8 A. Same thing. You will notice a lake
9 there.

10 Q. In Exhibit L.

11 A. You will notice there's a lake there.
12 Can you see it?

13 MADAM CHAIR: Yes.

14 MR. KING: You are not supposed to cut
15 300 feet from any lake or stream. I think that's a
16 lake.

17 MR. MARTEL: They changed that.

18 MR. KING: Did they?

19 MR. MARTEL: Years ago apparently that
20 was changed.

21 MR. KING: Not too long ago. Maybe five
22 years ago?

23 MR. MARTEL: I think it might be longer
24 than that, but nobody knew about the change.

25 MR. KING: The tourist operators would

1 know.

2 MR. MARTEL: Some people knew, but I am
3 just saying I don't think it was uniformly known. Now
4 it depends on the guideline.

5 MR. KING: There are a few trees left
6 behind. They're not worthwhile to bring a skidder in
7 there to take them away. It's not worth it.

8 MR. IRWIN: Q. The last one is --

9 MR. KING: A. That's the one I was going
10 90 miles an hour. That proves it.

11 Q. Do you want to show that one.

12 MADAM CHAIR: Your point about Exhibit
13 2165M, Mr. King.

14 MR. KING: See, it's no use for him to go
15 in there. He is the power saw man and I'm the skidder.
16 To go and get those two or three trees, it's not worth
17 it.

18 MR. IRWIN: I might as well deal with
19 these. I have some --

20 MADAM CHAIR: Excuse me, Mr. Irwin. In
21 this situation, Mr. King, you have a complaint about
22 this?

23 MR. KING: That clearcut was taken from
24 my car, right from the car.

25 MADAM CHAIR: All right. What's the

1 problem --

2 MR. KING: They clearcut it. See, it
3 hasn't been tree planted yet. That I'm sure of.

4 MR. IRWIN: Q. I am showing you some
5 larger black and whites. What does exhibit --

6 MR. KING: A. This has nothing to do
7 with the MNR. This is more like Ministry of the
8 Environment. Well, the Ontario government put a well
9 in there for these people here, these two in the back,
10 and it went dry. So these are little girls looking for
11 water because the well is dry.

12 Q. Where would they get their water
13 before?

14 A. A little further up the bush and the
15 native community branch did build these houses and put
16 the wells up, but they didn't work.

17 MADAM CHAIR: All right. This will
18 become Exhibit 21650.

19 MR. MARTEL: Did you say the Ministry of
20 the Environment drilled it or helped --

21 MR. KING: Native community branch.

22 MR. MARTEL: The community branch?

23 MR. KING: Native community branch.

24 MR. IRWIN: Q. I think P is a larger
25 version of --

1 MR. KING: A. Of what I'm talking about.
2 See how wide it is. It goes to my arm height.

3 Q. You say the cutting at the --

4 A. Is too high. Too high.

5 MADAM CHAIR: This is the same photograph
6 as Exhibit 2165F?

7 MR. KING: No, because I'm going across
8 this way. The other went down that way.

9 MADAM CHAIR: Was this the same stump,
10 but you are looking at it at its width as opposed to
11 its length.

12 MR. KING: Yes.

13 MADAM CHAIR: All right.

14 MR. IRWIN: Q. What is Exhibit G?

15 MR. KING: A. That's my brother there.

16 Q. That's your brother?

17 MR. CASSIDY: Do you have a problem with
18 your brother?

19 MR. KING: Yes, I do have a problem with
20 him.

21 MR. IRWIN: Q. What is Exhibit R?

22 MR. KING: A. Well, that's the same
23 thing. Another war veteran living in a home.

24 Q. It looks like the front of that house
25 is a garage door?

1 A. That's what it is.

2 Q. But it's not a garage?

3 A. No, It's not at garage.

4 Q. Why would you use a garage door in
5 front of a house?

6 A. When you've got nothing else, you've
7 got to go to the garbage to get it.

8 Q. That's where they got that?

9 A. Yes.

10 MADAM CHAIR: Mr. King, in these two
11 photographs, are you trying to show the Board that
12 there is substandard housing in Armstrong --

13 MR. KING: Nor native veterans only.

14 MR. IRWIN: Q. Are these both native
15 veterans?

16 MR. KING: A. Yeah.

17 Q. Did they fight in World War II?

18 A. Yeah. My brother was in (inaudible)
19 rifles...

20 MADAM CHAIR: The point of the last two
21 photographs was to show the condition of housing for
22 native veterans.

23 MR. IRWIN: Q. The last two photographs,
24 S and T, are photographs of children?

25 MR. KING: A. Same children. I will

1 explain it to them. This is spring water in Armstrong
2 and in the back you see houses on the White Sand
3 Reserve. It's good water, good drinking water. The
4 White Sand Band paid \$600,000 for water which is unfit
5 to drink. If you can make tea you will see the scum,
6 like oil on top. It has too much sulphur and oil.
7 What's the other word? Salt.

8 This is where they are getting their
9 drinking water. They're using the water from the base
10 - like, where I issued the keys from - for bathing and
11 washing and all that stuff. They don't use it for
12 cooking.

13 Armstrong got \$4 1/2-million to put this
14 water in through the whole town. Not only for the
15 native people, but for the whole town and the water is
16 not working. So that's why they still carry water from
17 the well to drink tea or coffee or whatever it is.

18 MADAM CHAIR: So you are saying that \$4
19 1/2-million was spent to provide drinking water to
20 everyone in Armstrong.

21 MR. KING: Plus the reserve.

22 MADAM CHAIR: Plus the reserve, but the
23 system is not working on the reserve.

24 MR. KING: Not on the reserve. I don't
25 know why.

1 MADAM CHAIR: The wells are not working
2 on the reserve and they are forced to take water from
3 contaminated streams or...

4 MR. KING: I supply most of the water.
5 My water is --

6 MADAM CHAIR: It is not contaminated, but
7 it is just poor quality water, naturally poor quality
8 water.

9 MR. KING: It comes from the base, like I
10 said. Like, when it first started we dumped all of DDT
11 and that sort of thing. CN has a lot to do with that
12 too.

13 MR. FREIDIN: Just while we are there,
14 the water from this spring where they are getting their
15 water from now is all right to drink?

16 MR. KING: Oh, yes. According to the
17 Department of Health, no, but the point to me is it's
18 good water. I did test it. It did come out .00. Mine
19 comes out .00. I look after my well. It is a hand
20 pump.

21 MADAM CHAIR: Why did the wells not work
22 on the reserve but they did in Armstrong?

23 MR. KING: See --

24 MADAM CHAIR: I mean in the other parts
25 of Armstrong?

1 MR. KING: I don't know. That's what
2 they were blaming everything on. The Ministry of the
3 Environment made a big study there and said the water
4 is good. There is nothing wrong with it.

5 If you go and get a cup of tea over there
6 you see the oil scum.

7 MADAM CHAIR: The water you are
8 complaining about is not the water from the wells
9 because you are not getting any water from wells.

10 MR. KING: No, no. The main well, the
11 main well in Armstrong, that's where all our water goes
12 to those houses, all brand new houses.

13 This is a spring. It's just a hole in
14 the ground. That's where they cut it for their tea. I
15 live in the west side of Armstrong and my water is .00.

16 I asked for a grant from the Native
17 Community Branch and they wouldn't give it to me for
18 \$15. So a white man gave me \$3.15, one of those rubber
19 plunges, and my water is .00. The best water in town.

20 MADAM CHAIR: So you are filtering your
21 own water at home?

22 MR. KING: Yeah.

23 MADAM CHAIR: But your complaint is that
24 the people who live in the reserve part of Armstrong
25 are required to take their water from a stream nearby?

1 MR. KING: Or my well. Some from my
2 well.

3 MR. IRWIN: Q. When did you take these
4 pictures?

5 MR. KING: A. Quite a few years ago.
6 These two girls are married already.

7 MADAM CHAIR: So they pictures are ten
8 years old?

9 MR. KING: Yes.

10 MADAM CHAIR: Are they still drinking
11 this water?

12 MR. KING: Yeah.

13 MADAM CHAIR: Exhibit 2165S and T, the
14 concern with the pictures that were taken in 1982
15 approximately, or 1981 is the date on the photographs,
16 and Mr. King is concerned about the water quality.

17 MR. KING: Yes.

18 MADAM CHAIR: The drinking water quality
19 used by the reserve.

20 All right. Thank you very much, Mr.
21 King.

22 MR. IRWIN: Do you want to have a seat.

23 Q. Now, you complained about wildlife
24 habitat; is that correct?

25 MR. KING: A. That is correct.

1 Q. Did you complain to Mr. Auls at one
2 time?

3 A. James, yeah.

4 Q. I see you have included his letter
5 here in your summation and he wrote back and told you
6 that with the logging operations with the clearcuts
7 limited in size will in many cases improve the habitat
8 for wildlife by providing a proper balance of food and
9 shelter. What do you think of that statement?

10 A. I don't agree with it.

11 Q. Why?

12 A. You saw that picture there where I've
13 my arm on top of that stump. Now, supposing that was a
14 nest of marten there, young ones...

15 Q. It's the last letter in the
16 Armstrong -- appendix B, the second last page.

17 MADAM CHAIR: This is a letter dated June
18 11th, 1980?

19 MR. IRWIN: July 14th, 1980.

20 MADAM CHAIR: July 14th, 1988?

21 MR. IRWIN: 1980.

22 MR. FREIDIN: It's a few more pages along
23 from the '88 letter that you just referred to.

24 MR. IRWIN: It is the second last -- in
25 my copy it is the second last page in appendix B.

1 MADAM CHAIR: Can you find this for me,
2 Mr. Irwin. All right, we have got it.

3 MR. IRWIN: Q. The last second last
4 paragraph of the July 14, 1980, letter states - from
5 Mr. Auls to yourself:

6 "Logging operations with the clearcuts
7 limited in size will in many cases
8 improve the habitat for wildlife by
9 providing a proper balance of food and
10 shelter."

11 Do any of you three want to respond to
12 that?

13 MR. KING: A. Yeah, that's not true.
14 That picture I'm talking about with my arm on top of
15 the stump, now supposing there was a marten that had
16 been there and had young ones and this machine comes
17 along now, when she hears that machine coming she will
18 kill her young and take off.

19 Q. Yes?

20 A. Also with mink. Weasles will do the
21 same thing, squirrels.

22 Q. Why do they kill the young?

23 A. Well, they would rather kill them
24 themselves than have man kill them. It's just a
25 natural instinct to do that. That's why animals do

1 that.

2 Also, it affects the birds' eggs in the
3 trees and also all other types of birds, insects,
4 reptiles. It affects the food. The food supply is
5 gone.

6 Q. Combined with the spraying, what
7 happens with the spraying?

8 A. Personally, I'm deadly against that.
9 After what I saw happened at the radar base. Mr.
10 Running in Thunder Bay said they want to spray up in
11 the Armstrong area. We did get a letter from them.
12 He said everything was tested by these people who sell
13 this herbicide whatever -- they got a special name for
14 it. I forget it.

15 Q. As a Commissioner, was it your job to
16 regulate what went in and out of that --

17 A. No, they just asked me for the key,
18 they signed for it.

19 Q. Did you see what was going out?

20 A. Well, I didn't know what was going on
21 actually. Like I said, we didn't have mosquitos. I
22 didn't know what effect DDT had until a few years
23 after.

24 Q. You knew it was DDT?

25 A. No, I didn't know then.

1 Q. Okay. When they closed the base,
2 what did they do with what was there?

3 A. Well, some stuff was transferred to
4 other bases. A lot of it was dumped. Paint and all
5 that stuff was dumped and old refrigerators and wire
6 and all that stuff.

7 Q. Dumped where?

8 A. Some of it went over the cliff and
9 some of it they dug up the ground and just dug it under
10 ground and pushed in the old refrigerators and all that
11 stuff.

12 Q. Is it still there to your knowledge?

13 A. There are all kinds of chemicals, you
14 know.

15 Q. Pardon me?

16 A. Chemicals, you know.

17 Q. Is it still there?

18 A. I imagine it's still there. Nobody
19 ever dug them up.

20 Q. You are nodding Mr. McGuire, Mike
21 McGuire. What do you know about this?

22 MR. M. MCGUIRE: A. Because I've seen
23 the dump. I seen the big hole and the old
24 refrigerators and all the stuff that he was describing
25 there. It was all dumped in there. I thought they

1 were going to leave it there because we were going to
2 go back and see what we could salvage out of it, but
3 when we come back you thought you had a lawn there.

4 Q. They covered it over?

5 A. They covered it all over. You
6 thought it was a lawn. We can pinpoint exactly where
7 it was.

8 Q. To your knowledge was it ever
9 uncovered?

10 MR. KING: A. No.

11 Q. So it's still there?

12 MR. M. MCGUIRE: A. I think that's why
13 they're having their problems with the water because
14 Hector and myself talked on this many times.

15 There is a lot of people getting cancer
16 in Armstrong and Hector told me one time, he says, it
17 is a good thing that the Metis people can't afford to
18 drink the water that the white people are drinking. We
19 have to go and get our water where it's good.

20 Q. From the stream?

21 A. We can't afford running water, so we
22 are not subject to dying, I guess.

23 Q. Now, in your brief, Mr. King, you say
24 that the spraying kills the aspen which is the
25 principal food of the beaver and moose, ruffed grouse?

1 MR. KING: A. Yeah.

2 Q. Does this have any impact on the
3 berries?

4 A. I think he can answer that question
5 better about the berries.

6 Q. Which one would like to answer that?

7 MR. P. McGUIRE: A. I will let him go
8 ahead. He can answer it just as well.

9 MR. M. McGUIRE: A. See, we grew up and
10 as part of our tradition as Metis people is to move
11 here and move there. Indian time, other people laugh
12 at that, but it is not a laughing matter to us.

13 Indian time to me refers to when the
14 berries are ripe in that one area. We know our country
15 and we know where the berries are and we know where
16 everything else is. We go out and pick them.

17 I'm deadly set against that spraying and
18 people say it's safe. It's not safe because it's
19 killing -- it kills our blueberries. That's one thing.
20 It kills the raspberries, the strawberries, the
21 cherries that we pick and the herbs that we eat. We
22 eat a lot of different types of herbs and we also use
23 them for medicines.

24 When you spray an area over it kills even
25 the snakes. A lot of people don't like snakes, but

1 they're a part of nature that we accept.

2 Q. Balance of nature?

3 A. Yes. The spiders even. I was going
4 to skill a spider when I was at home at my mother's and
5 I'm the one that almost got killed. She said: Don't
6 you ever kill a spider. That little creature was put
7 on here for a reason. I said: Well, he's crawling on
8 my food. She said: Chase him off. We were never
9 allowed to kill a spider in our house.

10 Q. I am going to move from the spiders
11 to the big projects. The -- I don't even know if I can
12 pronounce it. The Ogoki diversion (phoen)?

13 MR. KING: A. Ogoki diversion, yeah.

14 Q. And the Omabika Bay (phoen)?

15 A. Omabika Bay.

16 Q. What happened? This is probably more
17 a subject of the Ontario Hydro hearing --

18 MADAM CHAIR: Are we talking about the
19 Little Jack Fish project?

20 MR. KING: Yes, that would be it.

21 MR. IRWIN: Q. Is the Ogoki part of the
22 Jack Fish?

23 MR. KING: A. Yes.

24 Q. What happened to the spawning grounds
25 on these projects?

1 MR. P. MCGUIRE: A. What happens to the
2 spawning grounds is when they opened the water to come
3 down the Little Jack Fish, especially in the spring,
4 there is -- silt washes down and it washed down through
5 Omabika Bay which is probably about 15 miles long, plus
6 it also goes down into Lake Nipigon to Russell Island.

7 It looks like a big milky, muddy river
8 going through the lake and it deposits into -- most of
9 it deposits into Omabika Bay and pickerel spawn. They
10 still spawn there. Then it is covered up with silt and
11 the majority of the spawn is killed, but for some
12 reason or another the pickerel still spawn there. It
13 is just that most of the spawn is covered.

14 Q. Besides the silt, I believe you make
15 reference to water levels also affecting the spawn.

16 A. Yes, they fluctuated the water levels
17 quite extensively up until I think three or four years
18 ago. The Anglers and Hunters and the Beardmore
19 Watchdog Society in the Hornepayne area, it takes in
20 that whole area. The watchdog society started crying a
21 lot at the fisherman's associations.

22 The angler associations, the local one in
23 Lake Nipigon, started putting pressure on the ministry
24 and, in turn, the ministry put pressure on Hydro. So
25 now when the fishing are spawning they don't fluctuate

1 the water as much.

2 They still fluctuate it, but they used to
3 raise and lower Lake Nipigon. In two days they would
4 raise it a foot and they wouldn't stop until it was
5 raised four or five feet and then they would drop it
6 within the same length of time. In a ten-day period
7 they would drop it 10 feet. They still fluctuate it,
8 but they take a longer period of time to do it.

9 MR. M. MCGUIRE: A. Another result of
10 getting high water on our lake is it creates bigger
11 storms. The waves are bigger and last fall it washed
12 out one of the break waters. It broke it just like a
13 match and that's something that we never ever seen
14 before in your life. So the storms are bigger because
15 of the higher water.

16 Q. Do more damage. Now, while we are on
17 Little Jack Fish, do you have any general comments
18 about this? I only want general terms because this is
19 probably more appropriate to the Ontario Hydro hearing.

20 A. It's not only Ontario Hydro hearings
21 here. It's affecting all our lake and I say -- I
22 should say my lake because I'm a person from that lake.
23 I didn't come from any other part of eastern Canada,
24 any place else. I can prove exactly where I come from
25 on that lake, Lake Nipigon, and my whole ancestors come

1 from there. What they're doing there is they're going
2 to destroy us forever, I guess. Maybe they're going to
3 try it.

4 Dealing with this. If that Hydro project
5 goes through on Lake Nipigon the type of damage that
6 they're going to be putting is going to be the
7 hydraulic dam, it's going to be -- the water is going
8 to be held back for 12 hours and at peak times they say
9 they're going to let the water come. So we're going to
10 have a spring flood every 12 hours on Lake Nipigon. So
11 the silt that was mentioned before is only going to
12 intensify.

13 So they say: Well, we're going to stop
14 that. We're going to put boulders there, we're going
15 to put wire mesh there to stop erosion, but that's not
16 going to work because in Gull Bay when they started
17 raising and lowering the waters it started washing the
18 graves out. They say: Well, we're going to put these
19 big boulders here, so that's going to stop the erosion
20 of the reserve.

21 Well, that was fine. They went ahead and
22 spent a lot of money putting these boulders in. So
23 what happened to the boulders after the storms starting
24 growing back and forth, they started sinking into the
25 ground. Now you can't even tell where the walkway was

1 or where all them boulders were. That's not going to
2 work up there.

3 The other thing, too, is that all our
4 grave sites on Lake Nipigon, we know exactly where
5 every site is. I brought this up to Ontario Hydro and
6 they said: Can you be more specific. They want to
7 talk in lawyer talk and we can't talk like that. We've
8 got to talk the way we see things.

9 I said: Well, how would you like to see
10 your grandmother's feet sticking out of the ground
11 because they're washing the water back and forth. He
12 said: Well, you can't talk like that. I said: Well,
13 how else can I get my point across:

14 I think this summer or last summer they
15 found a body on the north end of Lake Nipigon on
16 Meeding Point and this is how they found him. His feet
17 was sticking out. So they dug him out and they took
18 him away and we never did hear any more about it.

19 MR. KING: A. He's probably over there
20 across the street there at the Royal Ontario Museum. I
21 think that's where they took him.

22 MR. M. MCGUIRE: A. Maybe we should go
23 see who it is. You see, the raising of the water is
24 another reason why our ancestors have to move out of
25 the reserve of White Sands. The big move came after

1 the Hydro dams were put in Lake Nipigon. When they put
2 the dams in the water comes up and started washing out
3 the graves. The bodies from those people were floating
4 around in Lake Nipigon.

5 So the people from White Sands said:
6 Well, we can't drink this water, it's polluted. They
7 migrated into Armstrong and then from Armstrong --
8 that's just like jumping out of the frying pan directly
9 into the fire because the evidence given here is the
10 water in Armstrong must be polluted too.

11 MR. KING: A. I would like to add to
12 Mike's. I will draw it out for you.

13 The Albany River flows into the Hudson
14 Bay and --

15 MADAM CHAIR: Excuse me for a moment, Mr.
16 King. What we might do to help the court reporter is
17 to let Mr. King draw his diagram and you could explain
18 to the court reporter what is taking place, Mr. Irwin,
19 in a loud voice.

20 MR. KING: This is the Albany River.

21 MADAM CHAIR: Mr. King is drawing the
22 Albany River and showing a dam on the Ogoki River.

23 MR. KING: This goes down this way into
24 Hudson Bay. This goes down to beautiful Lake Nipigon.
25 They had three sites where they were going to make that

1 dam.

2 Well, this place is pretty pathetic.
3 Trees are still sticking out here. They are still
4 sticking out here.

5 Now this is Zigzag Lake which will be all
6 in one lake. It will all be one lake.

7 So what I'm complaining -- of course,
8 this was done in 1939, 1940. These are still in the
9 water. The fish are still there. Now, the dam is
10 controlled from Thunder Bay. It fluctuates the water
11 level on Lake Nipigon. They found hundreds of
12 sturgeons. They opened this dam here, wide open, so
13 they had an environmental study on the river.
14 Whitefish were sticking their heads of the water trying
15 to get oxygen. There is no control of that dam.

16 MADAM CHAIR: So, Mr. King, what you have
17 tried to explain to the Board is what has historically
18 happened with damming that river and lake system in the
19 past and you are concerned that the proposed Hydro dam
20 project will cause even more sedimentation and
21 destruction of fisheries.

22 MR. IRWIN: Q. But you are seeing a lack
23 of oxygen in the fisheries?

24 MR. KING: A. In this lake, yeah,
25 Zigzag.

1 MADAM CHAIR: In Zigzag Lake.

2 MR. KING: It happened because they
3 opened this full blast and let it all out, then they
4 closed it. They automatic close it from Thunder Bay.
5 After they closed it too much water ran down the lake
6 and they found hundreds of sturgeon on the Ogoki River.

7 MR. IRWIN: Q. Alive or dead?

8 MR. KING: A. Dead.

9 MADAM CHAIR: The destruction of the
10 sturgeon fishery was in the 1940s.

11 MR. KING: No, the 1940s when they made
12 the first dam up here. This is why them trees are
13 still here. They clearcut the reservoir. They just
14 raised the water and left the trees as they were. A
15 pathetic sight. It looks pretty pathetic.

16 MR. IRWIN: Q. Okay. I want to look at
17 the upside and downside of this. Now, you have
18 indicated that there might be 800 employees coming in
19 on the Jack Fish project. What benefit is that to you?

20 MR. KING: A. Well, I spoke to the
21 union, the labour union, I said...

22 MADAM CHAIR: Could you repeat that, Mr.
23 Irwin. What did you say, Mr. King?

24 MR. IRWIN: He said he spoke to the
25 labour union about this, the president of the labour

1 union, and he was wearing two hats.

2 Q. Who was wearing two hats?

3 MR. KING: A. Me. As President of Metis
4 Association I demanded that the native people get 50
5 per cent of the jobs. I was told straight by Pat
6 Little, Department of Labour, he said: There is no way
7 your people are going to get a job there. He said: My
8 members have got to come first. I says: In that case
9 there will be no Hydro project. I said: We will block
10 the roads.

11 Q. Okay. That's maybe some jobs during
12 construction. What is the downside to these dams, the
13 downside to these dams in your area?

14 What's the damage or the deterrent or
15 what does it do to your area?

16 A. Well, I don't think we are going to
17 have that much damage because they are going to put
18 silt catchers in there. Like I said --

19 MADAM CHAIR: They want to put what, Mr.
20 King?

21 MR. KING: Silt catchers in the dam.

22 MADAM CHAIR: Hide is proposing to use
23 silt catchers in the Little Jack Fish Project.

24 MR. KING: Yeah.

25 MR. P. McGUIRE: What is actually going

1 to happen is that it's going to raise the mercury level
2 on Lake Nipigon to a level where it's not fit for human
3 consumption and, consequently, all the fish -- all the
4 commercial fishermen will be put out of work, but the
5 anglers will still be able to go there, but they will
6 catch the fish and throw it back in like they did on
7 the Wabigoon River.

8 It will take some 20 or 30 years for the
9 mercury level to go back down to an acceptable level so
10 you can consume the fish again. So if that goes on the
11 way they are going to put it on it's going to raise the
12 mercury level too high and it is going to put the Lake
13 Nipigon fisheries...

14 MR. IRWIN: Q. In the brief you make
15 reference to social problems and I assume this is
16 during construction. What social problems?

17 MR. P. McGUIRE: A. Well, there is an
18 awful lot of men going to be coming into a small area.
19 They have all the money and the Indians will flock
20 around the bars waiting for them to buy them beer. You
21 know the rest.

22 MR. MARTEL: Have you resolved the
23 problem of job allocation?

24 MR. KING: No.

25 MR. IRWIN: Q. Going back. Assume you

1 had aboriginal rights in that particular area and
2 assuming you had a certain lifestyle over the last
3 couple of hundred years going back in your families,
4 fishing, hunting and so on and assuming that lifestyle
5 is seriously getting eroded by cutting and dams and so
6 on, I want to call on Mr. Elliott at this time on how
7 you suggest an integrated system would work there.

8 Maybe you want to use the sketch again.
9 You did so well.

10 MR. ELLIOTT: A. One of the things that
11 we had talked about and have talked with members of the
12 Ontario Metis Association, I have talked with
13 representative from the Nishnawbe-Aski/NAN territory,
14 the 1815 Treaty council, some people from the Timmins
15 area which is still part of NAN and we talked about
16 economic development. Economic development being --
17 and we talk about self-governance in the same breath,
18 then the approach has to be -- if there are ten stages
19 to development or ten stages to a total completion
20 where a community is a community of cutters in the
21 lumber industry, that for economic development to be
22 total encompassing in self-governance that it has to
23 encompass, one, from being cutters all the way up to
24 the end markets.

25 How we got into this discussion was we

1 were looking at a joint venture with a U.S. tribe in
2 Michigan purchasing a sawmill operation in Michigan,
3 looking at the validity of it, trying to figure out if
4 it was a viable kind of project which would mean that
5 you would take an area such as around Nipigon or NAN
6 territory or whatever that would be, if you are cutting
7 it and it is going south and being processed south and
8 marketed out or even brought back in, then we ought to
9 look at the whole impact of that and what could we do
10 from a community point of view.

11 Rather than having somebody else come in
12 to the community or into an area, do all the other
13 stuff and you end up with - when they go - basically
14 your resources devastated and you really don't benefit.

15 The benefit has to come from a whole
16 part, a whole approach from being cutters to the
17 processing, to the manufacturing of a product.

18 We looked at selling pallets to U.S.
19 military using this same scenario of what benefits U.S.
20 tribes may have and what benefits aboriginal people
21 maybe in the north or whatever, looking at the thing
22 from a wholistic point of view, looking at it that way.

23 MR. MARTEL: It sounds like Canada.

24 MR. ELLIOTT: Pardon?

25 MR. MARTEL: It sounds like Canada.

1 MR. ELLIOTT: Well, what I think is
2 mostly impressive in the approach that they have taken
3 in eastern Lake Nipigon is that they are not only
4 concerned about Metis or treaty, but they are concerned
5 about the community or the people within the area to be
6 participants in the whole process and to me that's a
7 commendable approach to economic development rather
8 than having companies -- or even if they do have those
9 companies come in, at least those companies be
10 responsible to the people in the area.

11 MR. IRWIN: Thank you. That's the end of
12 our evidence.

13 MADAM CHAIR: Shall we take a break
14 before we continue with the cross-examination?

15 Mr. Cassidy, will you be cross-examining?

16 MR. CASSIDY: No, I have no
17 cross-examination of these witnesses.

18 Could I just get a clarification from Mr.
19 Irwin. Are the other witnesses who were scheduled to
20 appear today, are they going to be appearing today or
21 is that --

22 MR. IRWIN: No, this is the end.

23 MR. CASSIDY: That's it. I have no
24 further questions and I won't be appearing after the
25 break.

1 MADAM CHAIR: Thank you, Mr. Cassidy.

2 Mr. Freidin?

3 MR. FREIDIN: Could I have one minute or
4 30 seconds? I may have not have any questions either.

5 MADAM CHAIR: All right.

6 MR. FREIDIN: I have a few questions and
7 I can do it right now.

8 MADAM CHAIR: Why don't you go ahead
9 then, Mr. Freidin.

10 MR. FREIDIN: I think both questions are
11 for Mr. King.

12 CROSS-EXAMINATION BY MR. FREIDIN:

13 Q. One of the photographs where you said
14 that people from Armstrong are using some of the wood
15 that's been left at the roadside as firewood--

16 MR. KING: A. Yes, that's right.

17 Q. --is that a common occurrence? Not a
18 common occurrence, but do the people in fact utilize
19 that wood for firewood on a fairly regular basies?

20 A. We're all using it, yeah. They are
21 prepared to give it to us for nothing, too. One guy
22 asked and they said you can have it for nothing, but
23 you have to pay \$15 for a permit if you want to go and
24 cut wood.

25 Q. The area where this material was

1 buried, that was on the radar base?

2 A. I didn't get the question.

3 Q. You described some material being
4 buried?

5 A. Yes.

6 Q. That was on the radar base?

7 A. That was on the radar base, yeah.
8 I don't know exactly where they were buried, but...

9 Q. You also mentioned a problem with --
10 you had seen certain chemicals being used on the base.

11 A. Yes.

12 Q. Is that the DDT?

13 A. I assumed it was, yeah. I didn't
14 know anything about DDT. As a Commissioner we issued
15 all the keys and everything else, vehicles and all that
16 stuff.

17 Q. But the chemicals you were talking
18 about being used that you saw on the base were used for
19 the purposes of killing insects?

20 A. Yes.

21 MR. FREIDIN: Those are my questions.
22 Thank you.

23 MADAM CHAIR: Thank you, Mr. Freidin.

24 MR. KING: I just wanted to add on to it,
25 to the MNR. Are you not coming back this afternoon?

1 MR. FREIDIN: No.

2 MR. KING: Well, the MNR staff -- this
3 concerns two points. The school, the children of the
4 school Board.

5 One of the regional directors from North
6 Bay said the City of Toronto is a lot bigger than the
7 City of North Bay. We have to send out students out up
8 north to get money for education. You are hitting the
9 nail right on the head. When he finished -- and that
10 is what the MNR practice is.

11 They are picking the students from
12 Hamilton, Windsor, Toronto, North Bay, they are
13 bringing them up to Armstrong and they're taking jobs
14 away from native people. I'm talking about native
15 people who are in university and college. I'm more
16 interested in them.

17 Why the drop out? That's one of the
18 things. I said: Don't blame the native student, blame
19 the government agencies. MTC hasn't got one native
20 person working for them. They are taking jobs away
21 from these students from Toronto, and that's all a
22 problem. In the winter time the MNR hasn't got one
23 native person working for them. Not one. They bring
24 those students in to take jobs away from native people.
25 As a Chairman I am pretty peeved off about that one.

1 That's all I've got to say.

2 MR. IRWIN: Thank you, gentlemen.

3 That for us ends it, Madam Chair, Mr.
4 Martel.

5 On a personal note I want to thank you
6 for the courtesies extended. I did come in through the
7 most suspicious circumstances back in Thunder Bay. I
8 think the first thing you received was a letter from a
9 group up there saying I didn't represent them and they
10 were against whatever I had to say no matter what I was
11 going to say.

12 This has been a tremendous learning
13 experience for me as a non-native, just has to see how
14 things are done. I spent the weekend in Ottawa with
15 the Canadian bar. They had deputy ministers and
16 executive assistants and native leaders and everybody
17 just seemed to be there and it almost seems like you
18 get the feeling that this is inevitable.

19 We are just looking for a model and when
20 we are talking about agreements and co-management and
21 sovereignty we are looking for a model and some of the
22 stuff is right off the wall.

23 One serious proposal was to take the 600
24 reserves across Canada and make them as to the 11th
25 nation -- 11th province and written up by the claims

1 and so we listened to it. At least it was there,
2 something discussed, and I think that's the nature of
3 the model that you are having here.

4 We think ours is the best model. I think
5 we put an experienced team together. We wouldn't be
6 saying that unless we truly believed it because at some
7 point you have to go beyond the native community where
8 we work together.

9 I think what Mr. Elliott has said is true
10 when we started discussing this earlier. He said you
11 have got one point here, a simulation, which no one
12 wants and sovereignty over here which you are not going
13 to get.

14 I will leave this with you. It is
15 impressive and it was a talk, a very quiet talk by Mr.
16 Chartrand on the weekend who is an imminent Metis and
17 member of the Royal Commission and on the last page he
18 says, what's it all about. It's basically about
19 keeping promises. Very simple, keeping promises and
20 promises ought to be kept.

21 I can't recall the exact (inaudible) of
22 Treaty. As I recall, it was two purple rows on the
23 outside, shells on one, the native -- the birch bark
24 canoe in the other and non-native in a ship and several
25 rows of white in the middle and I forget what they

1 defined as true, honesty and justice and so on.

2 Somewhere we went wrong. We were
3 supposed to be going along together. Somewhere it
4 became one path, a non-native path. I think that if we
5 are to get back keeping promises and dealing with over
6 two million citizens of our country -- that's what we
7 are talking about. One in every, what, 20 is someone
8 we should be keeping a promise to and I think from this
9 timber management that we evolve something more than
10 just the care of trees.

11 Part of the mandate, it says so in the
12 Environmental Assessment Act, social problems, cultural
13 problems and in the end, you know, these are more
14 important than the trees per se.

15 I've enjoyed it. It has helped us get
16 our act together as a Metis Association. I don't think
17 we would have gotten this far.

18 I noticed, Madam Chair, that you were
19 checking the cover yesterday of our book. It's the
20 same. We paid for this and we sent, you know -- let's
21 say 500 we distributed and I don't think we have ever
22 gotten to that point if hadn't been this mechanism that
23 allowed us to put it together. It has been a
24 tremendous tool for the Metis people.

25 Thank you very much.

1 MADAM CHAIR: Thank you, Mr. Irwin. The
2 Board is very interested in making sure that we have
3 captured everything Mr. King has said today.

4 So I am going to ask the court reporter
5 to send you a copy of the draft transcript of this
6 portion of the evidence so that you can go through it,
7 and I think there will be some gaps.

8 MR. IRWIN: I think you ought to send it
9 to Hector to tell you what the gaps are.

10 MADAM CHAIR: I think that your
11 intervention in what has been said has captured most of
12 what Mr. King wanted to get on the record, but I would
13 appreciate it if you would go over it carefully and
14 inform the Board if there should be any additions to
15 what was said and we will let the other parties know if
16 that's the case.

17 The Board appreciates very much hearing
18 from OMAA and the Eastern Lake Nipigon Committee. We
19 have enjoyed seeing Messrs. McGuire again in front of
20 us and appreciate Mr. King travelling down from
21 Armstrong to be with us today, as well as the other
22 witnesses.

23 Thank you very much and you will be
24 notified of the progress of the hearing and will
25 receive copies of our decision when it comes out. I

1 don't know what the timing is going to be on that. We
2 will be in North Bay and Sudbury over the next period
3 of time and we expect to hear final argument this fall
4 and we will try to get the decision out as soon as we
5 can after that.

6 So, again, gentlemen, thank you all very
7 much for coming down to talk to us.

8 We will adjourn for today, but I
9 understand we will be hearing a motion this afternoon
10 at four o'clock. I don't think we are going to be able
11 to push up the time on that. So for those of you who
12 will be interested in the motion we will be back at
13 four o'clock today. Thank you.

14 ---Recess at 10:35 a.m.

15 ---On resuming at 4:05 p.m.

16 MADAM CHAIR: Good afternoon. Please be
17 seated.

18 Good afternoon, Mr. O'Leary.

19 MR. O'LEARY: Madam Chair, Mr. Martel.

20 MADAM CHAIR: We are here to discuss your
21 motion this afternoon. Before we start, let's make
22 sure we all have the same paper.

23 We have your Notice of Motion dated March
24 26th, 1992, we have your motion factum as well as your
25 brief of authorities.

1 We have received from the Ministry of the
2 Environment a submission of their position on your
3 notice, as well as a record of authorities relied upon
4 by the Ministry of the Environment and a copy of the
5 proclamation confirming the extension of the Intervenor
6 Funding Project Act to 1996.

7 We also have a letter from Mr. Hunter who
8 is not here, but I see Mr. Baeder dated March 31st,
9 1992, in disagreement. Their position I understand
10 will be in disagreement with your motion.

11 We have the affidavit -- we have an
12 earlier letter of March 30th. The letter of March
13 30th, 1992, was with your factum and authorities and
14 Dr. Quinney's affidavit.

15 MR. O'LEARY: That's correct.

16 MADAM CHAIR: That is all -- excuse me.
17 That's all the written material we have.

18 Are we supposed to have something from
19 you, Mr. Freidin?

20 MR. FREIDIN: Not in writing.

21 MADAM CHAIR: All right.

22 Mr. Cassidy?

23 MR. CASSIDY: No, Madam Chair. I had the
24 opportunity to read the written submission from the
25 Ministry of the Environment and am in substantial

1 agreement with it. Should it be necessary for me to
2 make comments I will do so.

3 MADAM CHAIR: All right, thank you.

4 The way we would like to proceed, Mr.
5 O'Leary, is to hear from you.

6 MR. O'LEARY: All right. I was going to
7 say there are a couple other documents while we are
8 still on that point; that is, the Ministry of Natural
9 Resources' reply evidence statements Nos. 1, 2 and as
10 of yesterday I received 3.

11 MADAM CHAIR: Yes, and we do have those
12 documents. Thank you.

13 MR. O'LEARY: I would doubt that those
14 have been marked as an exhibit, although I am not
15 certain. Perhaps because I am going to be making
16 reference to them we could mark them as exhibits now.

17 MADAM CHAIR: We don't normally mark the
18 materials we discuss in motions as exhibits.

19 MR. O'LEARY: Could we do it for
20 identification purposes perhaps.

21 MADAM CHAIR: Yes, we could. The Board
22 would like you to go through the important points in
23 your motion, Mr. O'Leary, as expeditiously as you can
24 and of particular concern to the Board is your argument
25 that somehow terms and conditions are more than

1 proposals and are somehow an indication of changes in
2 the undertaking.

3 The Board wishes to know how such
4 proposals could possibly bind this Board with respect
5 to anything that might be proposed by the Proponent or
6 the other parties including your own clients, and when
7 we get to that part of your motion in discussing
8 exactly what the terms and conditions are supposed to
9 be we want to spend a little bit time of time exploring
10 that with you.

11 MR. O'LEARY: Just a point of
12 clarification, Madam Chair. When you say the Board is
13 bound by terms and conditions --

14 MADAM CHAIR: No, I didn't say that. I
15 said, the Board is not bound by terms and conditions
16 and we want to know with respect to your argument that
17 somehow the undertaking is being changed, we want to
18 know how terms and conditions could do that.

19 MR. O'LEARY: I intend to address that
20 specifically, Madam Chair, and I will be brief.

21 I was happy to see that when you entered
22 the room you were smiling. I thought perhaps you
23 thought you were done with me, but I am back sooner
24 than perhaps you imagined.

25 Perhaps I should introduce some of my

1 colleagues. Ian Blue is a partner of mine at Cassels
2 Brock who is attending with me and one of students,
3 Rita (inaudible), as well. They have decided to assist
4 me here today.

5 I would like to thank the Board at first
6 for agreeing to hear the motion today and I realize we
7 are proceeding after normal hours, but --

8 MADAM CHAIR: Excuse me. These are the
9 normal hours for us to hear motions, Mr. O'Leary.

10 MR. O'LEARY: I didn't realize that.

11 MADAM CHAIR: We never listen to this
12 sort of thing before four o'clock.

13 MR. O'LEARY: For the rest of the world
14 they are abnormal.

15 MR. MARTEL: It certainly does great
16 wonders for getting through the stuff in a hurry.

17 MR. O'LEARY: That's fair. It was
18 important that we proceed at the earliest opportunity.
19 There has been one change which took some of the
20 pressure off initially and that is the proclamation
21 extending the Intervenor Funding Act, but it is still
22 important, as I hope I will be able to indicate during
23 my submissions, that we proceed at the earliest
24 opportunity here. Not least of which is the fact that
25 now is the time to issue a new public notice, when

1 parties can step forward and have a chance to examine
2 the Proponent on its new case.

3 Now, Madam Chair, Mr. Martel, as you
4 know, my involvement and the involvement of my firm is
5 fairly recent and I raise that only to set some
6 perspective in regards to this comment; that is, when I
7 first started examining the case, when I looked at the
8 Proponent's terms and conditions of January 6, 1992,
9 and over the course of the evidence that was put in on
10 behalf of the Coalition and the comparison to what was
11 initially filed by the Proponent, that which was
12 reviewed by the Ministry of the Environment's approval
13 branch, that which was given to the public, being the
14 environmental assessment document and the review,
15 that's the references that are contained in the notice
16 which is attached in my factum, it is an entirely
17 different case.

18 I was amazed that we were talking about
19 the same environmental assessment. The terms and
20 conditions as they are presently put forth are a
21 radical departure from that which is contained in
22 Exhibit No. 4 which is the environmental assessment
23 document.

24 MR. MARTEL: Can I ask you question.

25 MR. O'LEARY: Yes, sir.

1 MR. MARTEL: What do you think prompted
2 those changes?

3 MR. O'LEARY: Well, there was a number of
4 steps.

5 MR. MARTEL: I think it was the parties
6 to the hearing themselves in the negotiations, over two
7 sets of negotiations and over three sets of -- and
8 requests by the various parties for MNR to accommodate
9 the requests of the various parties.

10 It doesn't come as a surprise then that
11 there is change, does it?

12 MR. O'LEARY: Mr. Martel, the fact that
13 there has been change is a fact. The cause of that
14 change unquestionably is in part due to the discussions
15 between the various parties. My clients have been
16 involved in those discussions.

17 There may be some of those terms and
18 conditions which are contained in Exhibit No. 2032
19 which is the revised set of January 6, 1992 which we
20 agree with, but there are a whole host of them in there
21 which are indicated as being new which the parties have
22 not agreed to.

23 The covering letter from Messrs. Houser
24 Henry from Kathleen Murphy refer to those in boldface
25 type which there is no agreement to. There are a lot

1 of them in there. In fact, if I recall correctly,
2 there was some comment during my attendance here that
3 there seemed to more boldface than there is the other
4 type.

5 That indicates that there may be changes
6 that they had made. My respectful submission is there
7 have been changes that have been made. They are the
8 Proponent's changes and the law states that where there
9 have been changes to the undertaking that this Board,
10 like other administrative tribunals in this country, is
11 bound by the rules of natural justice and specifically
12 by the Statutory Power Procedures Act.

13 Now, Madam Chair, Mr. Martel, I am not
14 here to debate the merits of the terms and conditions.
15 As I have indicated, the Coalition may be in agreement
16 with some. Certainly we are because we have signed on
17 the dotted line in respect of a number of the changes,
18 but that's not the point that I am making today.

19 The concern that came to mind when I
20 recognized, given my recent involvement in this, and I
21 would like to think as somewhat as an objective
22 observer, the concern that came to my mind was that,
23 first of all, has the public been made aware of these
24 changes? Do they recognize the significance and the
25 consequences of the changes?

1 Are there individuals or groups who are
2 hiding in the weeds, if we can say it, or simply
3 ignorant to those changes and perhaps following your
4 decision, which hopefully will be at some point later
5 in the year, early next year, will say: That's not the
6 same case that I saw and reviewed back in March of
7 1988. There is a lot of different changes in that
8 decision.

9 If they find out that they are the result
10 of the Proponent's case being changed, my concern is
11 that we will see a Divisional Court application and the
12 judge there will be asked to review the environmental
13 assessment document, No. 4. They will be told that
14 there was over 60,000 pages of transcripts and 2100
15 different exhibits to this point and then we find that
16 on January 7th there is a brand new set of terms and
17 conditions that are filed which more or less summarize
18 all of the significant changes that have taken place
19 and that applicant to the Divisional Court is going to
20 say: That's nothing like what I saw way back when in
21 1988 and if I had known that these changes were going
22 to take place I would have have been participated. I
23 have been denied a right to examine the Proponent in a
24 very important area.

25 MR. MARTEL: Would that have applied in

1 '79 too when the first set of terms and conditions were
2 submitted? '89, pardon me.

3 It has been a long time. It only seems
4 that long, but why not in '89 then?

5 MR. O'LEARY: Mr. Martel, it may have. I
6 have not come to address that point and that is
7 difficult for me in a position where I have only
8 recently joined the hearing, but that being said, I do
9 believe that the defect can be cured at this time by
10 giving the public notice, by issuing a new notice of
11 public hearing and indicating to them that, yes, there
12 have been changes in the environmental assessment,
13 there have been changes in the Proponent's undertaking,
14 you can come and see them at this particular location,
15 that particular location, and we invite you to make
16 written comments, we invite you to make oral
17 representation if you feel that is in the best
18 interest, and I believe it is within your powers under
19 the rules to so limit the hearing, and to participate
20 in the cross-examination of the Proponent's reply
21 evidence.

22 At the end of the day that person that I
23 referred to before the Divisional Court judges would be
24 asked by the judge: Did you have a chance to
25 participate in the hearing in respect of the amendments

1 to the Proponent's undertaking and the answer would be
2 yes, and they would say: What's the problem. You were
3 given notice of these changes, you've had a chance to
4 participate. If they didn't they have got no one to
5 blame but themselves. That's the first concern.

6 The second concern is that by allowing
7 the Proponent to proceed in the manner which it appears
8 inclined to recommend to you the Proponent is
9 circumventing the intent and purpose of the Intervenor
10 Funding Act as well as the rules of natural justice in
11 the Statutory Power Producers ACT.

12 But to allow the Proponent to make
13 material amendments to its undertaking and just
14 continue on in its reply evidence which is specifically
15 what we are faced with here which, as I see it, is an
16 entirely new case and we haven't received all the reply
17 evidence. Reply statement No. 4 is still due, but in
18 comparison to what the Proponent said in its 22 months
19 of evidence, this reply statement, witness statements
20 seem to refer almost exclusively or at least to a large
21 portion to the changes in its undertaking.

22 To allow a proponent to do that without
23 issuing a new hearing notice denies the parties in the
24 hearing, first of all, the opportunity in advance of
25 knowing the case they have to meet, preparing a budget

1 and estimating the time that's required to participate
2 in the hearing and to make an application now under the
3 Intervenor Funding Act.

4 The point just briefly is that if the
5 Proponent is allowed to proceed as recommended - I am
6 presuming that Mr. Freidin is not going to adopt our
7 position today - then they will have been able to
8 circumvent any liability under the Intervenor Funding
9 Act, whereas it is submitted that the appropriate way
10 to proceed to ensure, first of all, that the hearing
11 won't be overturned at some point down the road is to
12 give a new notice of public hearing at this time and
13 that would then entitle parties who are new parties and
14 existing parties a right to make an application for
15 intervenor funding.

16 The third comment I would like to make is
17 in respect of the fact that it is unfair to allow the
18 Proponent to also proceed as proposed which is to file
19 materials which amount to a new case. It is not reply
20 evidence. It is a new case. The parties to the
21 hearing; in other words, those parties that have notice
22 of the material amendments are going to find it
23 difficult to meet this case.

24 The affidavit of Dr. Quinney indicates
25 that the Coalition may no longer be able to proceed by

1 reason of finances, and yet they are faced with a
2 situation of an entirely new case.

3 For these reasons it is submitted that
4 this amounts to a breach of the principles of natural
5 justice and procedural fairness.

6 The bottom line, Madam Chair, is that the
7 Coalition, if the relief that is sought today -- the
8 Coalition is faced with a situation where if the relief
9 is not sought where, first of all, it is unlikely to be
10 able to participate in the balance of the hearing to
11 any extent and that includes possibly making any real
12 attempt at filing argument and participating in very
13 important segments of this hearing including the reply
14 evidence as fashioned by the Proponent, but it also
15 then faces the risk that if in the end a party does
16 step forward and says: We didn't receive notice, we
17 have been prejudiced and the Divisional Court accepts
18 that application and the whole four years of hard work
19 that you have both spent in respect of this hearing is
20 quashed, the Coalition doesn't have the resources, it
21 doesn't have another million dollars to participate in
22 a rehearing. So there is a double whammy in that
23 respect from the Coalition's point of view.

24 The question that I think all the parties
25 to the hearing must ask themselves: Are they prepared

1 to assume such a risk. Are they prepared to say that
2 we should not issue a new notice of public hearing and
3 the possible disadvantages that might flow from that in
4 terms of delay, and I expect that is what we are going
5 to here today. There is going to be delay and the
6 floodgates will open and the whole bit, but I am going
7 to address that later in my submissions.

8 The real issue is whether or not we
9 should be taking the risk of proceeding in the absence
10 of that notice. Are we prepared to continue with the
11 proceeding without additional notice and face the
12 ultimate consequences of possibly having the entire
13 hearing and your decision quashed.

14 When you compare that possibility with
15 the likelihood of the alleged disadvantages we will
16 hear about later in the submission from others it is
17 respectfully submitted that the only logical route to
18 follow is to issue a new notice of public hearing and
19 identify the undertaking which is presently before the
20 Board.

21 Madam Chair, Mr. Martel, I will now go
22 into the meat of my submissions. I propose to do that
23 under three headings. The first is the nature of the
24 hearing, the second is a brief review of the Ministry
25 of Natural Resources' case now and as it was, and the

1 legal principles which we submit are applicable and the
2 rules which govern this particular proceeding.

3 In respect of this hearing, it must be
4 recalled that this is a class environmental assessment.
5 Its purpose is to approve a process which hopefully,
6 and I believe that I share that view with all of the
7 others, all of my friends and the other parties that
8 have participated, that hopefully will eliminate and
9 greatly reduce the need for individual environmental
10 assessments of timber management plans in the future.

11 By reason of that we are dealing with a
12 very important decision. If but 50 per cent of the
13 timber management plans that ultimately are brought
14 forward in the future do not require individual
15 environmental assessments by reason of this hearing,
16 the four or five years that will have been invested by
17 parties will be by comparison perceived as a bargain.

18 We are dealing with a geographic area
19 which represents approximately two-thirds of the
20 province and we are dealing with the interests and
21 rights of citizens throughout the province in respect
22 of the use of Crown lands.

23 It's a hearing that is going to have
24 consequences for generations to come. There may be a
25 review years down the road, but the decisions that are

1 made within this hearing will have a bearing on what
2 timber is cut and the nature of our landscape for
3 generations to come. As is indicated by the Coalition,
4 it is a matter which will affect at least the next
5 rotation of the forest.

6 This is a class environmental assessment
7 and as a result the undertaking in this hearing is
8 perhaps broader than you would find in your
9 run-of-the-mill, if I can use that expression,
10 individual environmental assessment.

11 I make reference to that and would remind
12 the Board of the decision it made on January 17th,
13 1990, in respect of a motion brought by the Ministry of
14 Natural Resources and that decision is important
15 because this panel made a decision, made a
16 determination at that time about what is the
17 undertaking that is before it. I don't propose to go
18 through this in any detail, but I would refer you to
19 page 6 of that decision and it's January 17th, 1990.
20 The first full paragraph on page 6, and this is --

21 MADAM CHAIR: Excuse me, Mr. O'Leary.
22 Did you include a copy of that in your authorities?

23 MR. O'LEARY: I did not.

24 MADAM CHAIR: We have got it, though.

25 Pardon me. Mr. Pascoe, I see it.

1 MR. O'LEARY: Page 6, Mr. Martel. The
2 first full paragraph. I will just read a short portion
3 the page.

4 "To suggest that the Board does not have
5 the jurisdiction to consider all relevant
6 aspects of the planning process under
7 which the named activities will be
8 carried out flies in the face of any
9 rationale which has been put forward over
10 the years to justify the use of the class
11 environmental assessment approach and the
12 proponent has voluntarily adduced
13 literally reams of evidence on timber
14 management planning matters in the course
15 of presenting its case to the Board
16 for approval of its application."

17 Three paragraphs down you make your
18 decision, and you state:

19 "The Board after carefully considering
20 the submissions made by all the parties
21 on this issue has concluded that on the
22 basis of the specific facts outlined in
23 both the documentary and oral evidence
24 presented in the hearing to date the
25 'undertaking' before this Board should

1 properly be defined or characterized as
2 a timber management proposal, plan or
3 program in respect of the activities of
4 access, harvest, renewal and maintenance
5 and hereby makes a finding to that
6 effect."

7 Madam Chair, Mr. Martel, the plain
8 reading of that decision says that the undertaking in
9 this case involved not only harvest, access, renewal
10 and maintenance, but involves the planning process
11 itself and that it is respectfully submitted is a
12 correct and logical decision. This is a class
13 environmental assessment and you must necessarily
14 consider the planning process. That must necessarily
15 be part of your jurisdiction, otherwise there is little
16 point in holding the hearing.

17 Now, I think it is important that I
18 distinguish between a question of whether or not you
19 have the jurisdiction to consider -- or whether or not
20 the undertaking encompasses the planning process and
21 whether or not the Board can approve a planning process
22 different from that proposed by the Ministry of Natural
23 Resources. I am not here to address that question
24 today. That, I understand, will be a subject of
25 argument, but whether or not you have the jurisdiction

1 to say we adopt the Coalition's terms and conditions
2 over that of the Proponent, that's an argument that may
3 be raised at another point, but that is not --

4 MADAM CHAIR: Excuse me. Or any of the
5 parties' terms and conditions, Mr. O'Leary.

6 MR. O'LEARY: I didn't mean to show
7 favour towards any, but that's correct. That's a
8 question that will be raised another day and it is not
9 one that need be answered in the context of today.

10 The important point is that the Board has
11 made a determination and this is what would be before a
12 court. This panel has made a determination that the
13 undertaking encompasses the planning process and that
14 planning process is set out in the revised terms and
15 conditions of January 6th, 1992, as well as some of the
16 prior documentation filed, but that's where it is.

17 Now, it is submitted that there are at
18 least three undeniable conclusions that can be drawn as
19 a result of my submissions.

20 The first is that the Proponent has
21 altered the planning process. In comparison to the
22 original EA document, Exhibit No. 4, the planning
23 process today is materially different and I will
24 address some of the specifics of that shortly, but it
25 is submitted that this is an undeniable fact.

1 Second, it has been the Proponent that
2 has amended its undertaking. Yes, there have been
3 consultations with other parties, but it is the
4 Proponent's responsibility to file and they have the
5 particulars of their undertaking and it is materially
6 different than that which the public was given notice
7 of back in March of 1988. That is another undeniable
8 fact. It is their terms and conditions, their planning
9 process.

10 The third is, and I am referring now to
11 the reply witness statements that the Proponent has
12 filed which will be given exhibit numbers for
13 identification at some point, Madam Chair. The
14 undeniable fact is that they have referred to -- the
15 Proponent has referred to these changes in many ways as
16 being major. They refer to some as being minor, but in
17 their own documents they are saying the amendments to
18 the undertaking are major.

19 MR. FREIDIN: We don't refer to it as the
20 undertaking. Don't mischaracterize it.

21 MR. O'LEARY: Mr. Freidin, you will have
22 your opportunity, but the document is filed. I would
23 love to be there, but at some point down the down road
24 if the danger which we submit exists and a party takes
25 this matter to the Divisional Court, I will enjoy Mr.

1 Freidin standing there and saying to the judges: We
2 didn't mean they were major changes to the undertaking,
3 we didn't mean that.

4 Those are the words in their documents,
5 major changes. What does a person who gets a copy of
6 those documents for the first time who has not
7 participated in those hearings say: They don't have
8 anything to do with the undertaking. What do they do
9 when they see your decision of January 17th, 1990,
10 which says that includes the planning process. There
11 have been major changes made to the planning process
12 and it is an undeniable fact it is submitted that the
13 Ministry of Natural Resources has even recognized them
14 as being major and minor. If I could borrow your
15 terminology, the reply statements are full of reams of
16 material in respect of these changes.

17 Madam Chair, I would like to move on now
18 to the comparison. I intend to be brief with this
19 because there is literally reams of material and if we
20 had the time it might be appropriate to go through
21 every term and condition that's been amended, but I
22 recognize that you have been here for the four years
23 and that the parties who have also attended would be
24 aware of the fact that there have been changes to the
25 planning process.

1 What I hope to bring to the Board's
2 attention are those portions upon which the Coalition
3 relies and it is submitted that these areas that will
4 be identified are sufficient for you to make a ruling
5 that there has been a material amendment to the
6 undertaking.

7 I should set out that these submissions
8 should not indicate that the Coalition is either
9 opposing or supporting any of the changes that I will
10 be referring to. That's not the purpose of this
11 exercise.

12 The purpose is to simply highlight the
13 fact that the members of the public would not be aware
14 of these materials changes and even the Proponent has
15 recognized the fact that they are material.

16 One of the first I would like to take you
17 to is if you turn to Exhibit 2032, Madam Chair, which
18 is the revised terms and conditions, on page 28. Term
19 and condition 95(a) as presently proposed, the
20 Proponent suggests that this approval shall remain in
21 effect for nine years.

22 If we compare that now to page 17 of
23 Exhibit 4, and you will find that under subheading 5(2)
24 Time Frame, the Proponent said in March 1988 -- well,
25 sorry, June 1987, which is when this document was

1 filed, that in submitting this class environmental
2 assessment MNR is requesting that the approval of the
3 environmental assessment remain in effect for at least
4 six years.

5 That's the period that the Ministry of
6 the Environment was told, that's the period that the
7 Coalition was told they were looking for at that point,
8 that's the period that the public was told the
9 Proponent was looking for approval. Now we see an
10 increase of 50 per cent to nine years. It is
11 respectfully submitted that that clearly amounts to a
12 material change in what the Proponent is looking for.

13 It goes further. If we go to 96 in the
14 revised terms and conditions, the Ministry is now
15 proposing during the 8th year of this approval to
16 undertake a review this undertaking.

17 If we go back to page 17 of Exhibit 4,
18 the Proponent says in the sixth year the MNR will
19 review this class environmental assessment in light of
20 experience gained through its application.

21 We are looking at another increase. The
22 public at one point thinks there will be a review at
23 six years. Now it is going to be put off for another
24 couple of years. This could result in a significant
25 prejudice to those who felt that if we let the Ministry

1 run with what it was proposing before for a few years
2 perhaps we could live with that, but when we start
3 talking about nine instead of six and eight instead of
4 six you have got a different case altogether.

5 If we look at appendix 7 of the revised
6 terms and conditions which is found at page 56, if we
7 look down the list of when these guidelines or
8 documents became available or will become available you
9 will find that at least 50 per cent have been developed
10 since this hearing came into being.

11 Under the heading (a) Provincial
12 Guidelines, no less than eight of ten have all been
13 developed subsequent to the filing of the environmental
14 assessment document of June 1987.

15 These are the manuals upon which timber
16 management, according to the proposals put forth by the
17 MNR, are going to go developed and devised. You are
18 going to know what trees to cut, what areas of concern
19 to protect, and yet the public hasn't had a chance to
20 review any of this. There was no notice made in
21 reference to (2), silvicultural guide 1988; (3) a
22 silvicultural guide to poplar working group 1989;
23 silvicultural guide for the tolerant hardwoods working
24 group in Ontario, 1990; (5) a silvicultural guide for
25 the white pine and red pine working groups in Ontario;

1 (7), (8), (9) and (10) under subheading B; three, four
2 out five out of five; and under subheading C the last
3 five as well.

4 They are all either in preparation; in
5 other words, trust us, don't worry, be happy or they
6 have been developed since initial notice went out in
7 this hearing. A member of the public could not have
8 reviewed these documents at this time. It is
9 respectfully submitted that this amounts to a new case.

10 MR. MARTEL: Can I ask you a question.
11 What do you think we have been doing here for the past
12 three years--

13 MR. O'LEARY: Mr. Martel --

14 MR. MARTEL: --and the various parties to
15 this hearing as this stuff has been introduced?

16 MR. O'LEARY: Mr. Martel, I understand
17 that the hearing has considered these documents as they
18 have been produced, but the concern that the Coalition
19 has and it is respectfully submitted that the other
20 parties and the Board should have is in respect of the
21 fact that all of these documents when looked at either
22 individually or collectively amount to not only a
23 change in the undertaking, but a significant change in
24 the undertaking. It is beyond the notice that was
25 given to the public in 1988.

1 MADAM CHAIR: The issue you are
2 addressing, Mr. O'Leary, is something that all of us at
3 the hearing have been wrestling with for four years and
4 that is the circumstance where the Proponent is
5 conducting its business as the hearing continues.

6 Obviously, this isn't the situation of a
7 landfill where the hearing goes on and all the T's are
8 crossed and the I's are dotted before you dig the hole
9 in the ground and begin to construct your landfill.
10 That isn't the case.

11 The ongoing enterprise of timber
12 management is ongoing. Obviously, the way the MNR
13 conducts its business has and continues to change
14 daily. I'm not even sure their counsel would have a
15 full appreciation of how the Ministry's business
16 changes on a daily or annual basis.

17 I don't want to confuse that with the
18 point you are making about possible changes to our
19 work, but at some point there has to be recognition
20 that in this case the Proponent is conducting its
21 business and is facing changes.

22 MR. O'LEARY: Madam Chair, I recognize
23 that the Ministry is presently carrying on those
24 activities, but the point that is submitted is
25 important here, is the fact that the public does not

1 know that it is proposing to do certain things, that it
2 is looking for approval to do things in a manner in
3 which it did not propose previously.

4 Now, if a notice went out and it
5 indicated that these are the terms and conditions that
6 the Proponent is now putting forth, this is the
7 undertaking the Proponent is now putting forth and one
8 of those terms and conditions which you ultimately
9 approved granted the Proponent to the right to carry on
10 with a particular activity without prior approval,
11 without getting into whether or not that is a proper
12 approval or not, that may be something that may be
13 permitted.

14 The point is that the public is not aware
15 of these manuals and guidelines. They might have
16 comments to make about the methodologies that are set
17 out therein and the impact that it is going to have on
18 their lives and their interests in those areas.

19 It has been four years since the notice
20 went out and these scores of documents have been filed
21 and the public has not been given any notice that the
22 Proponent now intends to use such documents.

23 I understand what you are saying, but the
24 concern is that at the end of the day we will have gone
25 through all this, there will have been great

1 consideration of all the documents that have been filed
2 and yet a court will say: Well, individuals and groups
3 have been prejudiced, we are going to have to quash the
4 proceedings and start all over again. That is a great
5 concern.

6 It is also difficult, as I attempted to
7 indicate earlier, for the parties that are
8 participating in the hearing for additional materials
9 to be brought forward and to respond to that case. It
10 is impossible in the Coalition's position from here on
11 in and there is a new case before the Board it is
12 respectfully submitted that under the requirements of
13 law necessitates the issuance of a new public notice of
14 hearing. In such circumstances the Intervenor Funding
15 Act becomes available, parties will then be able to
16 continue to participate in this important but lengthy
17 hearing.

18 MADAM CHAIR: Do you have more examples
19 that you wish to discuss today, Mr. O'Leary, with
20 respect to these changes?

21 MR. O'LEARY: I do, Madam Chair. If we
22 could go to -- I thought the quickest way might be to
23 first simply state that the Coalition adopts in support
24 of its motion today the points in the three reply
25 statements of the Proponent where they indicate that

1 there have been major or minor changes.

2 Rather than going through them one at a
3 time, they are summarized in the executive summaries of
4 each of those three statements. Now, there are
5 literally dozens of them. We would be here to midnight
6 to put them on to the record and I will be simply
7 reading them in and indicating that the possible and
8 the apparent differences, but they are acknowledged as
9 being a major change. I believe what might be most
10 helpful is to go to the reply statement No. 1,
11 page Roman numeral -- this is the executive summary.

12 MR. FREIDIN: Which document are we
13 looking at?

14 MR. O'LEARY: Reply statement No. 1. Go
15 to the executive summary, roman numeral 6, paragraph
16 No. 3. The Proponent states:

17 "In these reply witness statements MNR
18 focuses on its current proposed terms and
19 conditions (January 6, 1992)."

20 Well, that goes to a comment that was
21 made earlier that these witness statements are dealing
22 with revised terms and conditions not with
23 clarification of evidence or matters that came up in
24 cross-examination and the evidence of other panels, and
25 provides explanations for all major changes that have

1 occurred since the end of its evidence-in-chief and
2 provides reasons for the changes.

3 "These reasons constitute MNR's response
4 to evidence from other parties."

5 It is nice they put that last comment in,
6 but in fact what they are doing is they are
7 underscoring and trying to support the major changes
8 that they have made in the undertaking as identified in
9 the executive summary.

10 Now, these were just received. I don't
11 know whether the parties have had a chance to look at
12 them yet, but how it is broken down is the executive
13 summary highlights the major and minor changes.
14 However, in paragraph 3 the Proponent calls them all
15 major, and then they go into some detail in explaining
16 why these changes have been made and what they amount
17 to.

18 We are literally looking at hundreds of
19 pages of to-be-adopted evidence, but it is evidence
20 that's been filed by the Proponent in support of its
21 undertaking which refers to the changes that have been
22 made.

23 Madam Chair, for the record, the
24 Coalition is adopting reference to all of the major
25 changes and I am going to refer to a few more, but all

1 of the major changes as identified by the Proponent in
2 all three of the statements. That's not to say we
3 agree or disagree with the merits of them, but simply
4 that they are identified by the Proponent itself as
5 being major changes. It is submitted they are major
6 changes to the undertaking.

7 If we could just continue on in that
8 Roman numeral 6, Planning Teams, we are talking about
9 now in the terms and conditions having a member of the
10 local citizens' committee on the planning team. That's
11 entirely new. The local citizens' committee, there was
12 no such a creature, regardless of its merits, there was
13 no inkling of such a body in Exhibit No. 4. Under
14 major components of public consultation there is Roman
15 numeral 3, opportunities for special consultations.

16 We are now aware of an agreement between
17 one of the native groups and the Proponent which
18 involves the proposal of a parallel but separate
19 consultation process for at least one native group, and
20 I am not certain whether the others have sign off on
21 that or not.

22 Regardless of the Coalition's position in
23 respect of that, and it is recognized that this is a
24 sensitive issue in the province and in Canada at this
25 time, the fact remains that it is the very sort of

1 issue that the public, particularly those residents in
2 northern Ontario, would want to hear about, that there
3 is going to be a separate independent consultation
4 process for one particular group in northern Ontario.

5 MADAM CHAIR: That, of course, has been
6 part of the official record of our hearing since we
7 heard the case of NAN and Windigo Tribal Council last
8 fall. That is not new to reply evidence.

9 MR. O'LEARY: Madam Chair, I am not
10 saying that all of this is new to the reply evidence.
11 It's new to the Proponent's case that as a member of
12 the public that lived in northern Ontario the first
13 time I would have ever had a chance of even knowing
14 this happened was when the Proponent agreed with that
15 particular native group that such a process should be
16 included in its terms and conditions.

17 That person or that group may not have
18 participated in this hearing because no such
19 independent parallel process was being proposed. There
20 was no special treatment being advocated by the
21 Proponent in respect of native groups when they filed
22 their environmental assessment document. This is
23 completely different. Today isn't the day to go into
24 the merits of that, but the public has to be informed
25 of such a material change.

1 Paragraph 29 on Roman numeral 10 refers
2 to final plan approval. It is now the responsibility
3 of the regional director as opposed to the district
4 manager. It's not unlikely that members of various
5 communities and municipal authorities may see that as a
6 substantial and material change. (31), previous
7 proposals did not set out criteria to be used in
8 considering the appropriate category of plan amendment.
9 These criteria have now been added.

10 When did the public get notice of these
11 criteria? Yes, there are parties to this hearing that
12 are aware of that, but the issue is - and we are going
13 to be coming to the principle - has this hearing lived
14 up to the requirements of natural justice and has there
15 been reasonable notice to the public.

16 Further, to the parties in this hearing,
17 have they had an ability to meet the case that the
18 Proponent is now putting forth when you look at all the
19 various amendments that are being made, some of them
20 just within the last short while, others earlier than
21 that.

22 I am only highlighting for the sake of
23 time. It just isn't possible to go through them all,
24 but reply statement No. 2 says the same thing in the
25 executive summary, that they are identifying the

1 substantial changes or the major changes, reply
2 statement No. 3 says the same thing and the Coalition
3 relies on the to-be-filed reply statement No. 4.
4 Presumably that will state the same thing, but another
5 sense of the depth and the breadth of the changes is in
6 the executive summary for reply statement No. 3. No.
7 5:

8 "There is a new proposal for the addition
9 a formal standing committee of government
10 and non-government experts with an
11 integral role of setting priorities for
12 the creation of new implementation
13 manuals and ensuring that existing
14 manuals are kept current."

15 These manuals are the core to the whole
16 planning process. Surely this is a material change in
17 what the Proponent was advocating four years ago.

18 MADAM CHAIR: Is that reference to page 5
19 of reply--

20 MR. O'LEARY: Roman numeral 6, No. 5 of
21 statement 3. Paragraph No. 5.

22 We go to page 8 under the heading
23 Scientific Research and Technical Development, a more
24 material area is hard to imagine in terms of what and
25 how we are going to do it, but from 17 to 26 every

1 single item there is new or proposed. 17, a
2 provincially coordinated program will be implemented;
3 18, this proposal was first added in August 1990; 19, a
4 new proposal has been added; 20, a new proposal has
5 been added; 21, a new proposal has been added; 22, a
6 new proposal has been added; 23, a new proposal has
7 been added, 24, 25 and 26 are all similar in that
8 respect.

9 The changes are massive. That's not to
10 the say that they are wrong, that's not to say that
11 they are right, but from the standpoint of this hearing
12 the question that has to be asked is whether or not
13 they are such that requires the issuance of new notice
14 to the public. Failing that, whether or not we run the
15 risk of seeing all the work that's been done in respect
16 of timber management in this province thrown out the
17 window by three judges of the District Court that
18 believe that the rules of natural justice are something
19 worth upholding -- the Divisional Court. My apologies.
20 District court is defunct.

21 MADAM CHAIR: Mr. O'Leary, one question
22 and that is, just generally looking at the argument you
23 are making, how could this hearing ever end?

24 For example, let's say in the last day
25 before we write our decision MNR announces that it's

1 going to -- I have no idea what, but it is going to
2 make some extraordinary change in the undertaking.
3 Presumably that will require some public notice and
4 some continuation of the review of that change by
5 ourselves.

6 MR. O'LEARY: Madam Chair, your question
7 leads me right into the next area which is the legal
8 principles and several of which I will raise: One of
9 which flows from comments by your colleagues in the
10 Environmental Assessment Board.

11 One is that you have got to look at the
12 circumstances of the case, and the second which flows
13 out of that is that amendments to the undertaking if
14 minor perhaps may not require additional notice.

15 That's something that your colleagues
16 have stated in the southwestern Hydro decision which
17 was ultimately quashed, and I propose to direct you to
18 that.

19 It's hard to be able to respond to that
20 directly, Madam Chair without knowing what it is the
21 MNR would be proposing, but if these are the terms and
22 conditions they are prepared to live with, if that's
23 it, then there is no concern.

24 MADAM CHAIR: But we asked that question
25 before, Mr. O'Leary, and that is, the Board listens to

1 the proposals by all the parties and at the end of the
2 day feasibly we could accept none. We could say to the
3 Ministry of Natural Resources and Mr. Cassidy and so
4 forth: Thanks for all the work you have done for four
5 years, but you know what, we are not going to use any
6 of them. We have invented our own way of conducting
7 forestry in Ontario.

8 There is nothing binding the Board to
9 accepting anyone's terms and conditions including your
10 clients because they are proposals. That might be the
11 way MNR would like to conduct its business, but it is
12 not necessarily going to be the way the Board will
13 approve the application.

14 MR. O'LEARY: With respect, Madam Chair,
15 I don't think I am out of line here in saying that it
16 will be the Coalition's position that you do have the
17 ability to accept all or any portion of another
18 parties' terms and conditions instead of the
19 Proponent's.

20 MADAM CHAIR: Or none of the parties.

21 MR. O'LEARY: Or you may reject the
22 undertaking.

23 MADAM CHAIR: Or approval with our own
24 terms and conditions.

25 MR. O'LEARY: The difficulty there is

1 that the rules require some evidentiary base for a
2 decision to be made.

3 MADAM CHAIR: And we have lots of
4 evidence.

5 MR. O'LEARY: Right, 60,000 pages of it.
6 It is hard to respond to that and if you feel that such
7 an evidentiary base is there, then perhaps counsel
8 can -- Mr. Beram can advise you on that, but the point
9 that the Coalition will ultimately be making is that
10 you are not bound to accept the Proponent's terms and
11 conditions holus bolus or reject them, that you are
12 entitled to accept those put forth by other parties in
13 their place.

14 MR. MARTEL: My colleague started out
15 this afternoon by asking you -- and maybe I have missed
16 it, but I think she asked you if these were binding on
17 us, these proposals, all the stuff that MNR has put
18 forward.

19 I haven't heard an answer to that yet.
20 You see, that is what we are going to decide, isn't it?
21 Whether we have to accept this, whether the proposals
22 presented in MNR's case -- yours changed significantly
23 after you went through your first couple of sets as we
24 listened to the evidence.

25 I think you were involved in some of the

1 discussion during the presentation of your case where
2 you agreed that you would have to go back and revisit
3 your own terms and conditions, and when you present
4 them are they binding on this Board?

5 MR. O'LEARY: Mr. Martel, that is a
6 question that I had said earlier that I thought need
7 not be answered today.

8 MR. MARTEL: Maybe we would like it
9 answered because maybe that's significant to us, that
10 whether these proposals that we see before us by all
11 the parties are proposals or are they binding on us.

12 MR. O'LEARY: The issue with respect is
13 not whether they are binding, but whether or not you
14 have the jurisdiction to act on them and that you might
15 act on them.

16 They are there, the Coalition will
17 suggest and submit, for you to consider and attach as a
18 term or condition in the end in your decision, but I
19 don't quite understand what you mean by binding.

20 MR. MARTEL: Do we have to adopt them?

21 MR. O'LEARY: Do you have to adopt the
22 Coalition's as one over the other?

23 MADAM CHAIR: No. We are trying to sort
24 out, Mr. O'Leary, your position that the undertaking
25 has changed. When you point to terms and conditions as

1 representing changes to the undertaking the Board has
2 always seen terms and conditions as proposals that we
3 may accept or reject.

4 Now, what MNR does with respect --
5 whether they go out tomorrow and set up something or
6 other, we are not approving what they are doing today
7 and we are not approving what they are doing until we
8 render our decision.

9 They may say this is the way we are going
10 to do it and we may tell them in a year: No, we don't
11 think you should do it that way.

12 MR. O'LEARY: You certainly have the
13 power to reject what a proponent is putting forth, to
14 not accept their environmental assessment, but from the
15 public's point of view --

16 MR. MARTEL: We didn't say the
17 environmental assessment. I don't want to go that far
18 back. I just want to talk about the terms and
19 conditions, not the environmental assessment. That's
20 what we are trying to get a handle on.

21 Are the proposals presented by MNR
22 binding on this Board or is before the Board the
23 original documents with proposals for change presented
24 by all the parties?

25 Maybe I am misreading it, but I think

1 that's what I have to decide upon. Do I have to accept
2 what MNR is telling me because if it is, then the plan
3 has changed, but if I don't have to accept it, then I
4 am not sure the original plan has changed and that's
5 why we are trying to get from you your perception or
6 your view of whether these things are binding on us.

7 MR. O'LEARY: Excuse me. Madam Chair,
8 Mr. Martel, that isn't a question that I felt necessary
9 in terms of the motion.

10 With respect, the Board has ruled that an
11 environmental assessment in the past constitutes all of
12 the evidence, the environmental assessment document,
13 the terms and conditions, but in this case the
14 undertaking is what you stated as of January 17th,
15 1990, and these terms and conditions are now being put
16 forward by the Ministry as that undertaking.

17 In a few moments Mr. Freidin may say
18 that's not the planning process, but that is the
19 planning process. Where is the planning process if
20 that isn't it?

21 The concern is that after so much
22 evidence leading to a now amended undertaking by
23 failing to give notice to the public you may find
24 members and groups in the public who say: I would have
25 participated had I been given notice earlier.

1 MR. MARTEL: I thought the planning
2 process was in No. 7, I believe Exhibit 7, which is the
3 timber management planning process itself -- the
4 planning manual and the Environmental Assessment Act --
5 document No. 4 and I thought that what we were getting
6 for the past four years as people presented terms and
7 conditions is how they wanted the final approval to
8 appear and that everybody was putting this material to
9 us in hopes that they could convince the Board that
10 their proposals, their T's and C's were the appropriate
11 one which we should attach to documents 4 and 7 which I
12 understand will become a combined document in the final
13 analysis, and everybody has been jockeying, if I can use
14 the word, to get their proposals approved.

15 That's why we are having difficulty and
16 why we asked right from the outset, my colleague asked
17 you: Are these T's and C's, proposals, are they
18 binding on the Board.

19 MR. O'LEARY: Mr. Martel, I see perhaps
20 where I have not been clear. The submission is that
21 documents 4 and 7 have been amended by the terms and
22 conditions, that we are talking about something
23 different than what was stated in 4 and 7. They are
24 not compatible with what's contained now in the terms
25 and conditions.

1 MADAM CHAIR: Mr. O'Leary, the argument
2 that you are making, wouldn't we have had to -- if we
3 agree with you that we have a dilemma with respect to a
4 changed undertaking and a notice problem, wouldn't we
5 have had to design this hearing in such a way that at
6 some point in time and whatever date you want to pick,
7 let's say two years ago, we would have said that's the
8 application, that's the undertaking and even if all the
9 forests of Ontario burn to the ground in the next two
10 years we have got to ignore that because we must only
11 look at a very strictly defined undertaking and we must
12 ignore what is occurring in the real world because we
13 are worried about a notice problem, we are worried that
14 the public must know what's going on with current
15 operations?

16 Isn't that the position that a long, too
17 long hearing -- the Board is the first to say this
18 hearing has gone on too long, but isn't that the
19 problem that you have in conducting a long hearing?

20 MR. O'LEARY: Madam Chair, I wasn't here
21 at the time and I some feel somewhat presumptuous in
22 making a comment on that, but I think the answer to
23 that is yes, that at some point notice had to go out
24 and say that the undertaking is different, members of
25 the public should be commenting and given the right to

1 participate in the proceeding.

2 That being said, I don't think it's
3 necessarily too late, that we still have an opportunity
4 to cure a potential fatal defect.

5 MADAM CHAIR: But, Mr. O'Leary, what you
6 are saying is, let's say we agreed with you and we sent
7 out a notice next week to stop the hearing, start the
8 hearing, why wouldn't we have to do the same thing
9 three months later and the same thing two weeks after
10 that? Every time a circumstance or a situation changed
11 in the business of timber management planning we would
12 be in that same corner.

13 MR. O'LEARY: Well, one way that that
14 possibly could be addressed is the manner in which you
15 draft the notice. That is an important step, but
16 again, I come back to the argument that the
17 circumstances of the case are important and if we are
18 talking about a material amendment, if the Proponent
19 all of a sudden decided we are not going to take any
20 responsibility any longer for maintenance which is one
21 of the four activities, it is submitted that that is
22 the kind of matter that would require further notice.

23 If neither set of terms and conditions
24 were brought forth that had the same abundance of
25 changes as this, that further notice might be necessary

1 in those circumstances, but it is somewhat
2 hypothetical. The concern is that with so much time
3 having been invested to simply proceed given this
4 concern I think is somewhat temerarious on the part of
5 the Proponent because I would imagine it is desirous to
6 bring this to a conclusion as all the other parties
7 are.

8 In the interest of time there were
9 several other areas I would identify, but they are in
10 the executive summary and in the three reply statements
11 that have been filed.

12 Perhaps I could turn now to the factum
13 this was filed under page 5, paragraph No. 8.

14 MADAM CHAIR: Paragraph No. 8, Mr.
15 O'Leary?

16 MR. O'LEARY: Yes. I am starting there
17 under the heading The Law. I propose to quickly take
18 you through several important principles.

19 The first is that subsection 18(20)
20 states that:

21 "Except as otherwise provided in this
22 act, the Statutory Powers Procedure Act
23 applies to the proceedings of the Board."

24 The Environmental Assessment Board is a
25 creature of statute. Its life is dependent upon the

1 Environmental Assessment Act. That act requires
2 reference to and an observance of the Statutory Powers
3 Procedure Act. You can't get around that one.

4 I have included under Tab 2 of the brief
5 of authorities a copy of the Statutory Powers Procedure
6 Act. The salient portion simply reads that:

7 "The parties to a proceeding shall be
8 given reasonable notice of the hearing
9 by the tribunal..." and it sets out
10 three elements: Time, place and purpose of the
11 hearing, reference to the statutory authority and a
12 statement that if the party notified does not attend at
13 the hearing the tribunal may proceed in his absence.

14 It is noteworthy that that section comes
15 under Part 1 which reads Minimum Rules for Proceedings
16 of Certain Tribunals.

17 So the first question is how has the
18 Statutory Powers Procedure Act and the obligation on
19 this Board to give reasonable notice been interpreted
20 by the courts. There is no conflict at all on that
21 subject. There is an abundance of cases and they flow
22 out of one of the 700 or so different boards across
23 Canada, but the one case that is of particular
24 significance and assistance it is respectfully
25 submitted to this hearing is one involving an important

1 decision made by your colleagues in the southwestern
2 Ontario Hydro case which is found at Tab 3 of the brief
3 of authorities.

4 Now, the facts are fairly well known and
5 I will just briefly allude to them. This involved an
6 application by Ontario Hydro in respect of the proposed
7 construction of Hydro transmission from Bruce nuclear.
8 There was excess capacity and they had no way to get it
9 to market, if I can use that expression. A great deal
10 of time and money was spent by Ontario Hydro in terms
11 of having public consultations, preliminary meetings,
12 preliminary hearings, and that's acknowledge in the
13 decision which I will go through shortly.

14 The bottom line is that at the end the
15 court found that the notice was deficient and despite
16 all the money and time that had been spent, despite a
17 good deal of your colleague's time and despite a
18 decision having come down the Divisional Court,
19 including Mr. Justice Reid who wrote the decision for
20 the court - and I might add that he is presently a
21 respected author of the Administrative Law Letter which
22 is circulated widely within the profession and is a
23 recognized authority on the subject - quashed the
24 decision andd said: Sorry, but you are going to have
25 to start again. That's the very result that it is

1 submitted by issuing a further notice at this time such
2 a danger would be avoided.

3 Before I proceed into that case, I just
4 want to identify that there is both the statutory
5 requirement under the Statutory Powers Procedure Act
6 that reasonable notice be given, but there is also a
7 principle of law, what we we call natural justice or
8 procedural fairness, that the parties to a hearing be
9 given notice of the hearing and that they be given
10 sufficient particulars so they know the case that he or
11 she must meet.

12 So that even where that statutory
13 requirement doesn't exist the courts will intervene and
14 quash a decision if there has been a denial of natural
15 justice or procedural fairness.

16 At paragraph 9, I have to some extent
17 included a quote from a former member of this panel,
18 Mr. Jeffries, who states that:

19 "The importance of furnishing proper and
20 adequate notice to those persons who
21 might reasonably be expected to be
22 affected by the outcome of a hearing
23 cannot be understated for the courts
24 have shown little hesitation in striking
25 down a proceeding and any decision

1 resulting therefrom if it is determined
2 that a person's right to participate has
3 been jeopardized by improper notice."

4 That's taken from his work entitled
5 Environmental Approvals in Canada which is a handbook
6 which is used by members of the profession daily.

7 Turning to the Central Ontario case and
8 it's important because it summarizes a lot of the case
9 law because it has been applied specifically to the
10 Environmental Assessment Board. If I can turn you to
11 page 739, Mr. Justice Reid states in the second
12 paragraph, identifies one principle:

13 "In any event..."

14 MADAM CHAIR: Excuse me, Mr. O'Leary.

15 MR. O'LEARY: Sorry. Tab 3, page 739.

16 MADAM CHAIR: That's where I am.

17 MR. O'LEARY: The paragraph beginning "In
18 any event..."

19 MADAM CHAIR: Yes, go ahead.

20 MR. O'LEARY: "...it is well
21 established..." and you will see there
22 is a whole host of authorities below that he
23 identified.

24 "...it is well established that where the
25 form or content of notice is not laid

1 down it must be reasonable in the sense
2 that it conveys the real intentions of
3 the giver and enables the person to whom
4 it is directed to know what he must
5 meet."

6 There is authorities for the balance of
7 the page.

8 His Lordship then goes on and states, the
9 second paragraph from the bottom:

10 "Furthermore..." He is referring to the
11 situation involving the Environmental Assessment Board
12 in the Ontario Hydro case.

13 "Furthermore, the proceedings of the
14 Board herein were subject to the
15 provisions of the Statutory Powers
16 Procedure Act..."

17 Then he refers to Section 61 which I read
18 to you a few moments ago.

19 He states beginning at the very bottom:

20 "Thus, the adequacy of notice is not
21 dependent upon the views of the Board,
22 the notice must also meet the
23 requirements of the Statutory Powers
24 Procedure Act."

25 He is indicating what I attempted to

1 suggest a moment ago, that there is both the rules of
2 natural justice and also statutory requirement and
3 there is reference to the Seven-Eleven Taxi case which
4 I have also included under Tab 5 of the brief of
5 authority.

6 MR. BERAM: Just for the sake of the
7 record, Madam Chair, it is my understanding that the
8 decision of the Board that Mr. O'Leary speaks to is not
9 in fact a decision of the Environmental Assessment
10 Board, but one of the joint Board.

11 MADAM CHAIR: Yes, thank you.

12 MR. O'LEARY: Correct. It was under the
13 Consolidated Hearings Act, no question, but the notice
14 provisions are similar and the Statutory Powers
15 Procedure Act applies whether it is the discipline
16 committee for the Law Society or whether it is a
17 hearing under the Consolidated Hearing.

18 Just going down to the next paragraph,
19 Mr. Justice Reid states:

20 "Even in the absence of express statutory
21 requirement it is trite law that where
22 property rights or interests may be
23 affected notice must be given and even in
24 the absence of a statutory direction as
25 to form and content a notice given must

1 be reasonable in the circumstances."

2 His Lordship then refers to the decision
3 in the R versus Racing Commission case and that
4 decision was by the former Chief Justice of Ontario,
5 Chief Justice Gale and they have included a quote
6 there. This is reference in support of the submission
7 that the circumstances of the case are important. His
8 Lordship, Mr. Chief Justice Gale states at that time
9 that:

10 "The cases establish beyond peradventure
11 that whether a notice given in any
12 particular case is sufficient depends
13 entirely upon the circumstances of the
14 case."

15 The submission today Madam Chair, Mr.
16 Martel, is that if a person was to look at what is
17 presently before you it is entirely different than what
18 the notice referred to and the public had an
19 opportunity to review and made their decisions to
20 participate back in March 1988.

21 It is submitted that under those
22 circumstances it is likely that a court would say that
23 notice that was given on March 1st, 1988, is now
24 insufficient.

25 Turning the page to page 741, his

1 Lordship refers to some of the efforts that Hydro went
2 to and as a result, the very last sentence, he says:

3 "For these reasons I think that there has
4 occurred here a regrettable..." and he
5 is referring to the fact that we don't like to do it,
6 but I have got to,

7 "...but plain denial of natural justice
8 and a concomitant error of jurisdiction."

9 He goes on again to elaborate about what
10 Hydro had done. Those are the basic principles.

11 If we now move to paragraph 10 of the
12 factum that's filed on behalf of the Coalition, it is
13 respectfully submitted that the rules of natural
14 justice apply in respect of any amendment to the
15 undertaking and determine the extent to which the
16 assessment process need be repeated.

17 "Amendments which result in an
18 undertaking of an entirely different
19 nature may require starting the process
20 from the beginning, whereas minor changes
21 to the undertaking may be made without
22 giving any further notice or repeating
23 any procedures."

24 It is submitted in this hearing the
25 amendments to the Proponent's class environmental

1 assessment require at a minimum issuance of a new
2 notice of public hearing.

3 Now, those words may seem somewhat
4 familiar to parties and that's because they appear at
5 page 752 of the decision of the Divisional Court in Mr.
6 Reid's decision.

7 Starting at page 751, the very last
8 paragraph. Just to put it in context, his Lordship is
9 referring to a proposal made in respect of one of the
10 routes by participants. He states in the last
11 paragraph:

12 "The adoption of Foodland/Hydro's
13 proposal amounted to a considerable
14 amendment of Plan M3. The Board appeared
15 to recognize that any substantial change
16 in the proposed undertaking might require
17 starting the process from the beginning."

18 His Lordship then goes on at pages 24 and
19 25 of the reasons and on page 752 he quotes them.

20 "We have, however, agreed that the
21 undertaking may change as the assessment
22 process continues and, since the hearing
23 is part of the process, the undertaking
24 may be amended up until the time the
25 decision is rendered. Any change in the

1 undertaking must come from the proponent
2 since, by definition, the undertaking is
3 the proponent's preference from among the
4 alternatives. With any amendment to the
5 undertaking the rules of natural justice
6 apply to determine the extent to which
7 the assessment process would have to be
8 repeated. Amendments which result
9 in an undertaking of an entirely
10 different nature may require starting
11 the process from the beginning, whereas
12 minor changes to the undertaking may be
13 made without given any further notice or
14 repeating any procedures."

15 That goes back to the circumstances of
16 the case that Mr. Justice Gale spoke of. Again, it is
17 submitted that the circumstances of this case are such
18 that a member of the public would find that there have
19 been material changes to the undertaking and the
20 undertaking includes the terms and conditions, the
21 planning process of the Proponent and that as a result
22 there is a risk that a Divisional Court would accept
23 that argument and this entire hearing would be quashed.

24 Now, if I could turn you next under Tab 6
25 of the brief of authorities, it is a decision of the

1 this Board. It's involving Steetley Quarry Products
2 and it's a matter that was referred to the Board under
3 the Environmental Protection Act, but that's not
4 important for these purposes.

5 It involved an application by the
6 applicant and in the applicant's notice there was an
7 indication that if granted there would be no increase
8 in the approved capacity for the landfill.

9 The Board commenced the hearing and
10 determined that in fact the figure of 4.67 million
11 cubic yards which the proponent thought they had
12 available was not in fact the approved capacity and
13 they found that, in fact, approved capacity was 3.0
14 million cubic yards. They found there was a defect in
15 that respect.

16 The point that I wanted to draw to your
17 attention is that the Board considered a number of
18 alternatives and how to proceed in those circumstances,
19 and if I could ask you to turn to page 18 they identify
20 four alternatives.

21 MADAM CHAIR: Page 18, Mr. O'Leary?

22 MR. O'LEARY: Page 18 under Tab 6, Madam
23 Chair.

24 MADAM CHAIR: Thank you.

25 MR. O'LEARY: These are the alternatives

1 that the Board invited the parties to suggest to cure
2 the defect in that hearing and it is respectfully
3 submitted that there is -- I am going to suggest a
4 fifth that's applicable to this to cure the defect in
5 this hearing as a result of the material change to the
6 undertaking.

7 At the very bottom of page 18:

8 "The parties have identified four
9 alternate approaches arising out of the
10 Board's finding of approved capacity..."

11 The Board found something different than
12 the proponent had suggested.

13 "(1) continue with the hearing." They
14 didn't adopt that approach. They couldn't adopt that
15 approach given the fact that that hearing had the same
16 level of defect in its notice that this hearing does.

17 "(2) issue a new notice identifying the
18 capacity increase and then continue with
19 the hearing."

20 That's ultimately what they decided to do
21 with reference to the Intervenor Funding Act. They
22 felt there were people out there that would probably
23 want to be involved in that hearing and that this would
24 entitle them because of a new notice to make an
25 application under the Intervenor Funding Act.

1 "(3) send the matter back to the Director
2 with the Board's finding on approved
3 capacity."

4 They in fact did that as well. They sent
5 it back, but they felt that the director could turn
6 around and send it back to them within I believe it was
7 three month's time and they could then recommence the
8 hearing or proceed with a new hearing.

9 Well, the fourth was "dismiss the
10 application" which we are fearful will be the ultimate
11 decision of the Divisional Court. They didn't decide
12 that.

13 The fifth option, Madam Chair, Mr.
14 Martel, that we are suggesting could be adopted is that
15 it is not necessary to send it back to the MOE for
16 approval, that you have the jurisdiction to proceed
17 after issuing a new notice of public hearing and under
18 your Rules of Practice and Procedure adopting all the
19 prior evidence, oral and written, including the letters
20 of comment and proceeding under the new notice. The
21 public is then informed of the fact that the Proponent
22 is now proposing this which is radically and materially
23 different than what is was proposing in March of 1988.

24 That's the most expedient means of
25 proceeding. Since the Ministry of the Environment has

1 ... been involved in this hearing since the beginning it
2 seems logical that it need not be necessary to have the
3 present amended undertaking reviewed by the Approvals
4 Branch before it is sent back to this Board.

5 The jurisdiction issue of the notice
6 flows out of the Statutory Powers Procedure Act. This
7 Board is empowered by that section to issue a new
8 hearing notice. I think all of the legal jurisdiction
9 is there.

10 MR. FREIDIN: I'm sorry. Did you say
11 that you were asking the Board to order the issuance of
12 a new notice?

13 MR. O'LEARY: Well, the jurisdiction to
14 require the issuance of a new hearing notice flows out
15 of the Statutory Powers Procedure Act.

16 The practice, and I understand in this
17 case it happened as well, is to issue a direction to
18 the Proponent and, in fact, the Proponent would be
19 responsible for actually serving on the members of the
20 public and publishing that document in what is
21 considered to be the important newspapers and giving
22 notice to municipalities as required.

23 The decision of the Board, Madam Chair,
24 is found on page 25 and that is where they stated in
25 paragraph 2 that they decided to adjourn the hearing

1 "sine die pending amendment forthwith of the
2 application by the proponent, if it so chooses, to
3 reflect the findings of the Board."

4 It is because of that, because there was
5 an error that it is respectfully submitted the Board
6 felt obligated to send it back to the Approvals Branch.
7 Here there isn't an error of that nature in the sense
8 of the Proponent's case.

9 What has happened, though, is no less a
10 defect in terms of the requirement to give the public
11 reasonable notice. Under those circumstances it is
12 respectfully submitted that the matter need not be
13 referred back to the MOE for approval and then referral
14 back to this Board.

15 But noteworthy is their comment on page
16 24 in that one large paragraph where the Board states:

17 "Upon receipt of the revised notice of
18 referral from the Director, the Board
19 would then proceed to fix a date for the
20 resumption of the hearing and issue a new
21 notice to be given to the public. As it
22 is possible that one or more new
23 prospective parties might respond to a
24 new notice, it should contain reference
25 to the intervenor funding process."

1 So despite the fact they were
2 recommencing the hearing the Board felt that the
3 Intervenor Funding Act would still be applicable to the
4 continuation of that hearing.

5 The next decision I would like to refer
6 you to, Madam Chair, Mr. Martel is under Tab 8 and
7 that's a short Reasons for Decision in respect of an
8 application by the Industrial Transfer Centres Ltd. for
9 a certificate of approval under the Environmental
10 Protection Act for the establishment and operation of a
11 hazardous waste transfer and processing facility.

12 There aren't a great deal of facts in it,
13 but if I could turn you to page 8 I think the important
14 point can be summarized by what the Board has stated
15 there. It was an application for the facility that I
16 just mentioned. It states at page 8 where the Board
17 says at the top:

18 "The proponent has expended some
19 considerable effort in getting to this
20 stage. He has prepared documents to
21 support his application. The Board is
22 mindful of that. The Board is mindful as
23 as well as the expenditures made by other
24 parties on behalf of the public -
25 expenditures made by provincial

1 ministries, City officials and other
2 parties.

3 The Board recognizes that these factors
4 must be balanced in recognition of the
5 need to be absolutely fair to all
6 parties. But we have found that there
7 are some crucial faults in the present
8 evidence that were not proposed to be
9 addressed by the evidence to be called.

10 It would have been less than responsible
11 for the hearing to continue under such
12 circumstances and the Board dismisses the
13 application accordingly..." without
14 prejudice to the Industrial transfer Centres to
15 reapply.

16 What they say in the body of that is that
17 there had been an amendment to the application.
18 Specifically, it wished to remove two of the operations
19 which has been referred to in the application and the
20 Board felt that this was the sort of amendment that
21 meant you have got to go back to stage one, refer the
22 entire undertaking, the entire application to the
23 director of approvals for a review and ultimately it
24 would be considered again.

25 The point, Madam Chair, is that this is

1 not a novel motion. This is not something that has not
2 been raised in the context of a hearing before the
3 Environmental Assessment Board. It is one that your
4 colleagues have addressed previously and it is
5 submitted that this type of motion that is timely at
6 this point because if the public is given notice in a
7 reasonable short fashion it will have the ability to
8 review the present undertaking which is before you,
9 they will be able to cross-examine the Ministry and its
10 witnesses in its reply which deals with the material
11 amendments and it is respectfully submitted there will
12 not, therefore, be a denial of natural justice and the
13 risk of this hearing be overturned at some point in the
14 future will have been eliminated.

15 MR. MARTEL: Can I ask you how long you
16 think it would take someone to go back and review
17 everything that was there originally and that which is
18 there now in order to prepare to make a presentation or
19 refute some of the evidence as they might see fit?

20 How long do you think it would take to
21 set down this -- how long a delay do you think it would
22 take for someone to get ready?

23 MR. O'LEARY: The comparison would be, if
24 I may use a comparison, how long will it take to hold
25 the hearing again as opposed to a party coming in and

1 reviewing it for the first time.

2 That, with respect, Mr. Martel, is the
3 decision that this panel has to make. There is a risk
4 in our respectful that the hearing will be quashed. If
5 that happens there is going to be a delay far in excess
6 of the involvement of a party or the time or cost
7 involved of a party.

8 MR. MARTEL: But you haven't answered the
9 question that I asked because you are asking us to set
10 it down and I'm saying, how long do you think it would
11 take for someone to get prepared to get involved in the
12 manner you suggest they can.

13 I just want you to give me some kind of
14 ballpark figure of how long you think we should be
15 down.

16 MR. O'LEARY: The Steetley decision
17 involved a technical facility. It is the one under Tab
18 6 I believe. Yes. That was one where the Board
19 foresaw additional parties stepping forward. That's
20 why they included in the notice that would be given to
21 the public mention of the Intervenor Funding Act and in
22 that hearing the Board felt that they could be up and
23 running again within three months.

24 MR. MARTEL: But you are not answering
25 the question because, you see, we are not looking at

1 one little site. We are looking at a massive
2 undertaking that's presently before us and I am simply
3 trying to get an understanding having been here every
4 day for the four years how long you might think it
5 would take for someone who hadn't been involved before
6 to jump into the fray and get ready. Six months, eight
7 months, a year, how long?

8 MR. O'LEARY: I don't think three months
9 is outrageous in the sense that if they are going to be
10 cross-examining on the undertaking as presently before
11 the Board as opposed to cross-examining on the
12 undertaking which the public was given notice of in
13 March of 1988.

14 MR. MARTEL: So three months would be a
15 realistic time you think to set it down?

16 MR. O'LEARY: With respect I think that
17 would be reasonable. Three months following notice to
18 the public.

19 Under paragraph 11, I have briefly made
20 reference to another principle that was identified in
21 the southwestern Ontario Hydro decision of Mr. Justice
22 Reid and that is that it is not incumbent upon the
23 coalition to adduce evidence from witnesses alleging
24 actual prejudice by reason of a failure to receive
25 notice of a public hearing.

1 It is a legal evidentiary point that's
2 being made, but the public doesn't know what's
3 happened. Therefore, the courts have held that it is
4 not necessary for a party to the hearing therefore to
5 go out and canvass the public to prove actual
6 prejudice. The fact that the notice is insufficient is
7 enough to quash a hearing.

8 The authority for that is found on pages
9 742 through 745 in the southwestern Ontario decision.
10 Mr. Justice Reid relies upon an old English authority
11 of Wilson and then agrees with it and adopts it.

12 Paragraph 12 of the factum, Madam Chair,
13 deals with your jurisdiction to use your Rules of
14 Practice and Procedure to ensure that the continuation
15 of the hearing or the new hearing will proceed
16 expeditiously and that you are not starting from
17 scratch again. I have included reference to that under
18 paragraph 12.

19 Paragraph 13 and 14 deals with the
20 Intervenor Funding Act and I have included that given
21 one of the submissions that it is prejudicial to the
22 Coalition and other parties to find themselves in a
23 situation now where they are facing an entirely
24 different case. Page 8 of the factum, Madam Chair.

25 MADAM CHAIR: Thank you.

1 MR. O'LEARY: To find themselves now
2 facing an entirely different case to proceed. It is
3 prejudicial to these parties to allow the Proponent to
4 materially amend the undertaking and proceed on the
5 basis of a notice that was issued in March of 1988. By
6 reason of that notice, that to this point the
7 Intervenor Funding Act has not been applicable.

8 It is submitted that if a new notice of
9 public hearing was issued identifying the undertaking
10 as it presently exists and that's given to the public,
11 that not only will parties and members of the public
12 who would now like to participate be entitled to
13 apply under the Intervenor Funding Act, this panel will
14 also be empowered with the ability to award cost.

15 There is a comment that was made in -- I
16 will refer you to Tab 12. There is a comment made by
17 Mr. Jeffrey in his handbook at Section 482 where he
18 states, and that's the very last tab in the brief of
19 authorities:

20 "Thus, in the case of the MNR timber
21 management class environmental assessment
22 application presently before the
23 Environmental Assessment Board for which
24 intervenor funding has been provided by
25 order-in-council the Intervenor Funding

1 Project Act will not apply nor will the
2 EAB have the power to award costs at the
3 conclusion of that proceeding."

4 That is, of course, assuming that you
5 don't grant the relief sought.

6 "The Board in this case lacks the power
7 to address any inequities which may
8 result in the event that intervenor
9 funding provided by order-in-council
10 proves inadequate and in not having the
11 cost power as being deprived of an
12 important mechanism for controlling the
13 conduct of parties."

14 It is respectfully submitted that the
15 evidence before you, that of the affidavit of Dr.
16 Quinney is that the intervenor funding by way of
17 order-in-council has been inadequate to the Coalition
18 to this date and that they are prejudiced by reason of
19 both the limitation and their involvement to this
20 point, but also, as stated in his affidavit, their
21 inability to participate perhaps at all for the balance
22 given loss of funding.

23 It is submitted further that you will
24 then have the power to award costs and that is an
25 important tool in expediting the evidence in the future

1 and in ensuring conduct which is appropriate to
2 complete the hearing in a timely fashion.

3 MADAM CHAIR: Mr. O'Leary, we are going
4 to have to take a break for Ms. Callaghan.

5 How much longer are you going to be?

6 MR. O'LEARY: Ten minutes, perhaps.
7 Fifteen.

8 MADAM CHAIR: I think we are going to
9 take our break now.

10 MR. O'LEARY: I may be shorter.

11 MADAM CHAIR: We will be back at in six
12 o'clock.

13 Let's canvass very quickly the other
14 parties. Having heard Mr. O'Leary's arguments so far,
15 how long do you think you will be in responding to
16 these matters?

17 MR. FREIDIN: Madam Chair, I think there
18 was sort of an agreement by other counsel that I would
19 go first. Based on the submissions which have been
20 made I believe I will take at least an hour.

21 I know other counsel I have spoken to may
22 have additional comments to make quite irrespective of
23 what I may say because of the fact they believe that
24 the decision of the Board could affect their particular
25 clients.

1 Before we perhaps break or during the
2 break we could consider whether in fact, having regard
3 to the hour of the day and the length of time that I
4 think is going to be necessary to finish this motion,
5 the Board consider reconvening tomorrow to in fact
6 complete this motion.

7 MADAM CHAIR: All right. It would be
8 helpful to the Board if counsel could get together over
9 the break and tell us how long you are going to be.

10 Also, Mr. Colborne, you might be provided
11 an opportunity to respond tonight if you planned to go
12 home to Thunder Bay later this evening.

13 MR. COLBORNE: Yes. I will speak to
14 other counsel today. I was going to be very brief and
15 it was simply by good fortune I guess one would say
16 that I am here on other business.

17 MADAM CHAIR: All right. Is ten minutes
18 long enough for a break? Thank you.

19 ---Recess at 5:40 p.m.

20 ---On resuming at 5:55 p.m.

21 MADAM CHAIR: Please be seated.

22 MR. O'LEARY: Madam Chair, we have
23 discussed briefly the possibility of proceeding at
24 another time. The difficulty I have is that I am
25 involved in a Court of Appeal matter this week and I am

1 ..obligated to be there I believe the balance of the week
2 starting tomorrow and there is going to be evening
3 preparation time.

4 If I had my way I should have been there
5 today as well, but there is another counsel who will
6 not be there tomorrow and I have to be there and I will
7 be making argument perhaps as early as tomorrow and it
8 could be Thursday. I am in a bit of a tight spot in
9 terms of another day this week. I would be happy to
10 proceed and if we can complete it tonight.

11 MADAM CHAIR: The next date that the
12 Board will be in Toronto, as you know we are leaving
13 for North Bay next week, and the next date we will be
14 in Toronto is April 27th, the week of April the 27th.

15 So the alternative is to keep going
16 tonight, although we would have to break at some time
17 and have dinner.

18 MR. O'LEARY: I won't be much longer if
19 that helps expedite matters.

20 MADAM CHAIR: Are you satisfied if we
21 don't finish today to pick up again April 27th?

22 MR. O'LEARY: I would prefer to be able
23 to finish today. Two reasons. One is that it is going
24 to lengthen the process undoubtedly between today's
25 date and that date. I am sure other people will have

1 additional things to say, but some of the importance of
2 this is in dealing with it expeditiously, that notice
3 should go out sooner rather than later.

4 If it is April 27th, we are talking about
5 another almost full month down the road. We are that
6 much closer to the date when the Proponent is going to
7 be attending here and that's a month that we have lost.

8 MADAM CHAIR: You are not available
9 tomorrow night, Mr. O'Leary, to finish?

10 MR. O'LEARY: I don't believe so. I
11 cannot commit to that presently.

12 MADAM CHAIR: What is the preference of
13 the other parties?

14 MR. FREIDIN: Madam Chair, I think the
15 time frame, as I have indicated to you earlier, is
16 accurate. I have no preference one way or the other.

17 The suggestion that I made to consider
18 whether we wanted to continue tonight was only out of
19 the concern that it may be difficult for the Board to
20 proceed late into the night and be able to sort of
21 grasp everything that's going on.

22 That was the only motivation I had in
23 raising the subject matter in the first place. So I am
24 in the Board's hands as to whether you want to finish
25 tonight or not. I am quite content to deal with the

1 matter April the 27th or any other date that the Board
2 deems appropriate.

3 MADAM CHAIR: Realistically are we
4 talking an additional three hours?

5 Mr. Freidin, you will be an hour.

6 MR. FREIDIN: We are going to be an
7 additional hour by me and you can canvass the other
8 parties, but I can assure you that I am not going to be
9 saying anything that Mr. O'Leary is going to want to
10 hear and I would expect that he is going to want to
11 take some time to reply.

12 MADAM CHAIR: Mr. Freidin, you are going
13 to be an hour.

14 How long are you going to be, Mr.
15 Colborne?

16 MR. COLBORNE: Very brief. Five minutes.

17 MADAM CHAIR: Mr. Lindgren?

18 MR. LINDGREN: Three minutes or less
19 depending on what Mr. Freidin says.

20 MADAM CHAIR: Ms. Seaborn?

21 MS. SEABORN: Madam Chair, I filed
22 something in writing. So subject to the Board's
23 questions on that material and what I hear from Mr.
24 Freidin I will be relatively brief as well.

25 MADAM CHAIR: Thank you.

1 Mr. Cassidy?

2 MR. CASSIDY: The same as Mr. Lindgren or
3 even shorter.

4 MADAM CHAIR: Thank you.

5 Mr. Baeder?

6 MR. BAEDER: Very brief.

7 MADAM CHAIR: All right. So we are
8 really looking at an hour and a bit to finish off all
9 the other parties.

10 How long would you need to reply?

11 MR. O'LEARY: I have no way of
12 estimating, but I can assure you I will not be any
13 longer than the parties.

14 MADAM CHAIR: What the Board is
15 suggesting to the parties is that we would finish
16 hearing Mr. O'Leary and then we will need a short
17 dinner break and then we will come back and finish this
18 evening.

19 All right. Go ahead, Mr. O'Leary.

20 MR. O'LEARY: Thank you, Madam Chair. I
21 just propose to summarize. I thought I might start
22 simply by trying to address Mr. Martel's question again
23 about whether or not you are bound by the terms and
24 conditions that have been filed.

25 Mr. Martel, Madam Chair, technically

1 perhaps not, but the point that the Coalition is
2 making, the submission is that the public has to be
3 given notice of the material changes in the undertaking
4 and that includes by your own decision the planning
5 process that's presently proposed by the Ministry of
6 Natural Resources.

7 If in the end you decide to adopt all or
8 any portion of those terms and conditions, it is
9 submitted that it is open to a party that did not have
10 notice that such material changes were going to be
11 proposed by the Proponent to raise and take issue with
12 the matter in the Divisional Court and that you are
13 bound by the rules of natural justice and by the
14 Statutory Powers Procedure Act.

15 MADAM CHAIR: Mr. O'Leary, can we ask you
16 how you would respond to the situation where, in fact,
17 we had no terms and conditions at this hearing, that if
18 fact the Board had not initiated a process that in our
19 opinion gave a greater degree of participation to the
20 parties at the hearing with respect to the evidence
21 before the Board, but let's assume that in fact this
22 situation did not exist?

23 As you know, we have always been as
24 careful as we could possibly be with respect to making
25 this process fair, recognizing that the interests of

1 everyone in the province essentially is at stake with
2 respect to this application and from day one of the
3 hearing we were concerned that the application was in
4 fact impenetrable for the public, that it was such a
5 complicated application and that timber management
6 planning is a very complex business and we set up
7 around the province -- I forget now how many, but more
8 than a dozen depositories for transcripts so that the
9 public could in fact be kept informed of the daily
10 events at the hearing, recognizing that we couldn't
11 send a notice out every time something happened at the
12 hearing, but that the public would have an opportunity
13 to follow the hearing and understand what the evidence
14 was and the fact that we have conducted the hearing in
15 northern Ontario for two years and that in fact we have
16 conducted the hearing in 16 communities across northern
17 Ontario, that we have never denied an individual or a
18 party status at the hearing, that new parties continue
19 to enter the hearing whenever they want. We have
20 always listened to what people had to say about this
21 application.

22 Now, given that there would be no terms
23 and conditions, let's assume that we don't have any in
24 front of us, would the argument be with respect to
25 reply evidence -- would you be making the same argument

1 that in fact the undertaking had been materially
2 changed by the Proponent?

3 MR. O'LEARY: If they weren't contained
4 in terms and conditions?

5 MADAM CHAIR: No terms and conditions.

6 MR. O'LEARY: What the Proponent is
7 presently proposing, I find it difficult to separate it
8 out, but presumably you are saying that what is
9 contained in the terms and conditions would be
10 contained in another document and that amounts to --

11 MADAM CHAIR: No, not necessarily. Let's
12 say the proponent -- if you could separate out terms
13 and conditions from other reply evidence that the
14 Proponent was given, would you still feel that the
15 reply evidence represented a material change in the
16 undertaking?

17 MR. O'LEARY: It is the Coalition's
18 position that the aggregate of all of the changes
19 between what the Proponent proposed that it gave to the
20 MOE for review and to which the public was given notice
21 in 1988 is different and has been amended by, amongst
22 other things, the terms and conditions, but when the
23 reply evidence is received orally, yes, that's the
24 amendment, as well as the terms and conditions now.

25 MADAM CHAIR: You know that we had

1 certainly anticipated that the parties might challenge
2 what was proper evidence being introduce by MNR and we
3 had set aside -- well, a year ago we scheduled several
4 days for the parties to speak to the Board about what
5 they considered would be proper reply evidence because
6 it had been a concern that MNR not put in a new case
7 with respect to its reply evidence.

8 MR. O'LEARY: In the case at hand, the
9 terms and conditions are marked as an exhibit, they are
10 put forward by the Proponent for approval, for your
11 acceptance and approval. That's what the Proponent is
12 asking.

13 The question it becomes then --
14 undoubtedly all the parties would admit that every
15 attempt had been made to see that the hearing is
16 conducted in a fair manner and you have gone to
17 extraordinary lengths with respect to the parties, but
18 the question is: Are good intentions enough and the
19 rules of natural justice and the procedural
20 requirements of the Statutory Powers Procedure Act
21 state that notice has to be reasonable and those
22 intentions just may not be good enough to convince the
23 Divisional Court that this hearing was properly founded
24 on the notice that was issued in March of 1988 and
25 that's the danger.

1 MADAM CHAIR: So what your position is -
2 we just want to get this very clear - is that even if
3 no changes have been made to the undertaking, even if
4 it is just the Proponent or the parties proposing
5 changes to the undertaking, that is a sufficient
6 concern with respect to notice?

7 MR. O'LEARY: What the Proponent is
8 proposing for this panel to accept and to approve is
9 the evidence that you have heard, the terms and
10 conditions are part of its evidence. It is part of its
11 case, it is part of its undertaking. That's what you
12 are being asked to review, accept and approve and those
13 are the things that have been changed so materially
14 since the original notice was given in March of 1988.

15 MADAM CHAIR: Another question with
16 respect to the terms and conditions. It is your view
17 that public notice should be sent out to say: Look at
18 the terms and conditions of the MNR, and would that
19 public notice be also look at the terms and conditions
20 of the other parties?

21 MR. O'LEARY: Madam Chair, I have in the
22 past found, and the decisions tend to indicate, that
23 there is usually a great deal of care and thought that
24 goes into the actual drafting of a notice that goes to
25 the public.

1 It is difficult in a few moments to frame
2 the exact wording. Certainly, the public should be
3 apprised of what the Proponent's case is and what it
4 consists of and it is usually my experience that
5 various parties come to some sort of agreement with the
6 help of Board counsel and the Proponent to come up with
7 a notice that is fair to the public and gives a
8 sufficient -- or sufficiently identifies the case that
9 is presently before the Board. I don't think I can
10 simply characterize it immediately for you at this
11 moment.

12 My final submissions are simply that a
13 reasonable person stepping into this hearing, like I
14 was when I walked in a couple of months ago, would come
15 to the conclusion that the case the Proponent is
16 putting forth is materially different than that which
17 notice was given to the public in March of 1988 and
18 that amounts to a defect, that defect can be cured as
19 the Coalition is proposing, that the advantages of
20 taking that step at this time far outweigh any
21 perceived disadvantages associated in following along
22 those lines, that any exception of delay or possibility
23 of further parties becoming involved can be dealt with
24 and the hearing can be completed expeditiously, and the
25 - fact that other parties might get involved is the whole

1 reason why notice must go out, is that there are
2 parties likely to want to become involved at this
3 stage.

4 The very fact that this hearing began
5 before the Intervenor Funding Act means that there may
6 be a number of parties who would like to have been
7 involved who could have participated and would have
8 made valuable submissions have not been able to by
9 reason of funding and they have been precluded by that
10 fact and here is a manner in which that can be
11 addressed.

12 The final point is that I believe that by
13 giving notice at this time your decision will
14 ultimately be enhanced in terms of the public
15 perception, that it was invited to review and make
16 comment with respect to the Proponent's, apparently one
17 of its -- at least should be its final at this stage
18 revised terms and conditions, but that is presently the
19 undertaking that's put forth to you and I suggest and
20 submit that that would enhance the perception of this
21 hearing and your decision ultimately in the eyes of the
22 public.

23 Those are my submissions, Madam Chair.

24 MADAM CHAIR: Another question, Mr.

25 O'Leary, and it is going to sound facetious because you

1 know Mr. Martel and I are rather reluctant arbiters of
2 this long, long hearing and would relish any
3 opportunity for its conclusion as quickly as possible.

4 Would it be fair for this panel if we
5 decided that for some reason this case had been
6 materially changed, that the undertaking was very
7 different, would it be fair for Mr. Martel and I to
8 continue hearing the case or would it be fair for a new
9 panel to be constituted and, in effect, start a new
10 hearing?

11 MR. O'LEARY: Judging by what has
12 happened in the past, panels such as yourselves have
13 felt that a hearing should be reconstituted with a
14 different panel with a complete review.

15 It's our submission that that's not
16 necessary in this case, that defects are cureable by
17 means of the issuance of a new notice of public hearing
18 and it is submitted that it would constitute a new
19 hearing, but that you have the power to adopt all of
20 the evidence from the previous hearing.

21 Whether or not it is fair, the question
22 of fairness is to whom and in terms of the Coalition it
23 does not have the resources to participate in a
24 rehearing. To them it would be prejudicial, but it
25 certainly is within your jurisdiction to make that

1 determination, in our opinion.

2 MADAM CHAIR: Before you leave, Mr.
3 O'Leary, could you explain to the Board again why it
4 can start a hearing on its own? Why we would be
5 required to have a designation by the Ministry of the
6 Environment?

7 MR. O'LEARY: The position starts with
8 the Statutory Powers Procedure Act which is under Tab 2
9 of the brief of authorities and that is the act which
10 you referred to by 18(20) of the Environmental
11 Assessment Act and that says that you must give
12 reasonable notice. Reasonable notice has been
13 interpreted by the courts to mean all those things that
14 have been discussed. That's the statutory jurisdiction
15 to do that.

16 Within the Environmental Assessment Act
17 itself you also have the jurisdiction to make an order
18 or any decision -- I should refer you to the specific
19 section I believe under 23, 23(2) which --

20 MR. FREIDIN: Which section, Mr. O'Leary?

21 MR. O'LEARY: 23(2) of the Environmental
22 Assessment Act.

23 MR. FREIDIN: Thank you.

24 MR. O'LEARY: Starting with 23, the
25 important portion is this, right at the very beginning:

1 "Within 28 days after receipt by the
2 Minister of the decision of the Board on
3 any matter referred to it by notice..."

4 So on any matter it is submitted that
5 that constitutes also this matter, this motion.

6 Subsection 2 states that if that 28 days
7 expires and there has been no variation or change by
8 the Minister of the Environment then your decision
9 becomes final and that gives you the authority in that
10 respect and your decision would become final after that
11 point. It is out of those sections that it is
12 submitted your authority to make the relief sought
13 sought is found.

14 A concern that would come to mind and
15 something Mr. Beram might have to address is that if
16 you don't find the authority in those sections, then
17 maybe you might become obligated to dismiss the case
18 and start again. I don't believe -- it is submitted on
19 behalf of the Coalition that that is in fact the
20 correct interpretation of the statutes and your
21 jurisdiction.

22 MADAM CHAIR: Thank you.

23 Thank you, Mr. O'Leary.

24 All right. We will take a break and be
25 back at a quarter after seven to conclude hearing this

1 motion.

2 ---Recess at 6:15 p.m.

3 ---On resuming at 7:30 p.m.

4 MADAM CHAIR: Please be seated.

5 Mr. Freidin?

6 MR. FREIDIN: Madam Chair, let me begin
7 by indicating that the response of the Proponent on the
8 major issues or points made by my friend is, firstly,
9 that the changes to the terms and conditions of the
10 Proponent are not of such a nature that the undertaking
11 is of an entirely different nature. I choose those
12 words purposefully and you will see the reasons why in
13 a moment.

14 The Proponent also submits that the
15 changes to the Proponent's terms and conditions does
16 not constitute changes in the planning process such
17 that the planning process which is being advocated by
18 the Proponent is of an entirely different nature.

19 If the Board agrees with that submission,
20 I submit to you that the law would indicate that there
21 is no necessity for another notice to be issued. The
22 law would indicate that the notice which was issued in
23 May of 1988 or earlier than that in 1988 in fact was
24 adequate notice to the public of this hearing then and
25 it still is adequate notice of this hearing.

1 Secondly, I will be making submissions
2 that my friend's submissions about not having money to
3 fully participate in the hearing or to participate to
4 the extent they would like to is a red herring.

5 In the context of the decision which you
6 are being asked to make and that is that the hearing
7 which was issued back in early 1980 is for some reason
8 deficient. What I am saying is the fact that they may
9 want some more money to participate in the hearing
10 doesn't mean the notice was no good. One has got
11 absolutely nothing, in my respectful submission, to do
12 with the other.

13 I would like to begin, Madam Chair, by
14 reviewing with you some of the law which was referred
15 to you by my friend Mr. O'Leary, and the general
16 propositions of law that he cited are correct.

17 What he failed to do was to refer you to
18 any of the facts of those cases so that the Board could
19 get an appreciation of the circumstances in which the
20 courts and various boards have decided that there was
21 indeed a change which resulted in the undertaking being
22 of an entirely different nature.

23 I submit to you when I review these case
24 or after I have reviewed these case it will become
25 quite apparent that the kinds of changes which have

1 been made to the Proponent's terms and conditions don't
2 come anywhere close to the kinds of changes which were
3 described as ones which may be undertaking of an
4 entirely different nature and which resulted in other
5 cases saying the original notice was inadequate.

6 Now, the first case I would like to refer
7 you to is the case which is at Tab No. 3 of the
8 Coalition's brief of authorities and that is the case
9 of southwest Hydro. If we could turn for a moment to
10 page 752, right at the top of the page is where Mr.
11 Justice Reid quoted from the Board's decision which was
12 being reviewed in this particular case. I think it is
13 worth repeating or highlighting that again, although
14 not withstanding my friend has referred to it. The
15 Board decision said:

16 "We have agreed that the undertaking may
17 change as the assessment process
18 continues and since the hearing is part
19 of the process the undertaking may be
20 amended up until the time the decision is
21 rendered."

22 It goes down to the next paragraph:

23 "With any amendment to the undertaking
24 the rules of natural justice apply to
25 determine the extent to which the

1 assessment process would have to be
2 repeated."

3 I agree with that. That's a valid
4 proposition of law. Then it says:

5 "Amendments that result..." and this is
6 the test.

7 "Amendments that result in an undertaking
8 of an entirely different nature may
9 require starting the process from the
10 beginning, whereas minor changes to the
11 undertaking may be made without given any
12 further notice or repeating any
13 procedures."

14 My friend has indicated to you correctly
15 that in this particular case, within the facts of this
16 particular case the court said the original notice was
17 invalid.

18 I suggest to you, Madam Chair, it is
19 important to determine why the Board decided that and
20 we can see why the Board decided that by merely
21 referring to the headnote of this case. The
22 headnote -- when I refer to headnote, Madam Chair, at
23 the beginning of all reported decisions of the court
24 there is a summary of the decision in what they call
25 the headnote and in this particular case we find it

1 commencing on page 715 and running through to 717 and
2 as I think the headnote reflects the note accurately I
3 am going to refer you to portions of the headnote.

4 If we could refer to page 716 and in
5 particular the third full paragraph. It has a letter E
6 on the right-hand side.

7 MR. O'LEARY: If I might just make a
8 point, Madam Chair. It is quite correct that there is
9 a headnote there, but I think it should be pointed out
10 that the judges that heard this matter had no
11 participation in the headnote that appears at the
12 beginning.

13 It is a summary by an individual after
14 the fact that did not participate in that hearing.

15 MR. FREIDIN: Mr. O'Leary, if you think
16 that the headnote and the parts I refer to are not
17 properly reflected in the decision it is your right to
18 say so.

19 MR. O'LEARY: I am simply indicating that
20 that's not law. It is a headnote.

21 MR. FREIDIN: Thank you for the
22 education.

23 Now, Madam Chair, if we start with
24 subparagraph E, it says:

25 "The Board released the reasons for its

1 decision in June, 1982, and its formal
2 decision in July, 1983. In its decision,
3 the board rejected the system plan
4 recommend by Ontario Hydro and instead it
5 adopted another of the six originally
6 proposed, but with major modifications,
7 including a route stage study area along
8 a major highway, which ran through
9 several municipalities which had not
10 appeared on Ontario Hydro's original
11 proposals."

12 In effect what happened was they approved
13 a line that went through an area which nobody could
14 have anticipated the line could have gone through based
15 on the notice which was issued.

16 At the bottom where it says, just before
17 the last paragraph, "Held, the application should be
18 grant", this is where they basically held that the
19 notice was insufficient. They state in the second last
20 line:

21 "Even though the form and content of the
22 notice is not prescribed, it must be
23 reasonable in the sense that it conveys
24 the real intention of the giver and
25 enables the recipient to know the case he

1 must meet."

2 In No. 2, define why it was insufficient.

3 "The notice given by Ontario Hydro was
4 not reasonable with respect to the
5 residents in the affected areas since it
6 referred to southwestern Ontario and many
7 of them believed that they were outside
8 that area."

9 In the body of the judgment it indicates
10 that it was reasonable for these people -- reasonable
11 to assume that these people would not even believe they
12 were in southwestern Ontario.

13 "The geographic description was too
14 vague to be of assistance to them and was
15 not supported by maps from which they
16 could have determined that they were
17 affected by the hearings."

18 So in that particular case, no map. They
19 ended up building the line or having an approval of a
20 line in an area which no one could possibly have
21 thought that there was going to be a line.

22 In my respectful submission, that case is
23 an example of where the undertaking was indeed one of
24 an entirely different nature, and as a result there was
25 prejudice to the people who lived in the area where

1 they had no idea that in fact there might be a line
2 constructed in their area. Quite different, I would
3 submit, from the case before you.

4 Tab No. 5, the case of the Divisional
5 Court, 1975. Now, this wasn't referred to by my friend
6 in his oral submissions, but it is in his factum, it is
7 in his case book and that's an indication to you that
8 it is to be relied upon. I will deal with that very
9 briefly again to describe to you a completely different
10 situation; one where it is clear that there would be
11 prejudice to the individuals concerned.

12 Now, in this case Mr. Justice Reid again,
13 if you go to the second paragraph of the text of the
14 case, you will see it says that the applicant, this
15 Seven-Eleven Taxi Company, had enjoyed for some time a
16 number of taxi licences. In early 1975 the applicant
17 applied for a renewal of the taxi licences and he paid
18 the necessary fee and at the end of March, going over
19 to page 678, the applicant was informed that his
20 application was under consideration.

21 On April the 1st, however, the applicant
22 received a letter from Mr. Hore stating that the review
23 of applications for taxi licences had been completed
24 and informed the applicant that only No. 70, one of the
25 nine licences he had applied for, had been renewed.

1 Now, what happened is that the licence
2 holder went to the city or to the commission, City of
3 Brampton, and he said: What happened? Why didn't you
4 give me the licences? Why did you only give me one out
5 of the nine that I wanted and he told: Sorry, we don't
6 have to give you any reasons.

7 If you turn to page 679, he thought that
8 was pretty unreasonable. If you look at page 679 you
9 will see in the last full paragraph a description of
10 the Brampton Taxi Licensing By-law which governed the
11 meeting at which this decision was made in relation to
12 the licences. I am looking at the paragraph at the
13 bottom.

14 "The applicant relies on the Statutory
15 Powers Procedure Act."

16 It becomes directly relevant because of
17 the taxi licensing by-law because the Statutory Powers
18 Procedure Act was expressly adopted in the following
19 terms. Now we are looking at what the by-law said.

20 "Failure to comply with any of the
21 regulations of this By-law shall, in the
22 discretion of the Council, be sufficient
23 cause for the suspension or revocation of
24 a License issued under this By-law;
25 before revoking any such license, the

1 holder thereof shall be entitled to a
2 hearing before Council in accordance with
3 the Statutory Powers Procedure Act."

4 The court held, they found as a fact that
5 the person wasn't even allowed a hearing at all. He
6 wasn't invited to come and make submissions and when he
7 found out that a decision had been made against him he
8 was: I'm sorry, you can't get the reasons.

9 The court said that is completely
10 unacceptable, that is prejudicial and is contrary to
11 the by-law which says that he shall be entitled to a
12 hearing.

13 That, again, is apparent if we stay on
14 page 679 and we go up to the second last paragraph
15 where the court found:

16 "As I observed at the outset, the facts
17 disclosed in these affidavits were not
18 contested. It is thus apparent that no
19 real opportunity was given to the
20 applicant to know what the grounds were
21 upon which the cancellation of licences
22 was being considered."

23 Now, there is a case where it is clear
24 that there is prejudice to somebody who could be
25 affected by the outcome of that particular hearing. In

1 this situation they quashed the decision.

2 My friend is suggesting that somehow --
3 if he is suggesting that this case in some way suggests
4 that under the fact of this case we are running a
5 similar risk, I would submit to you that that's
6 stretching that case well beyond any reasonable limit.

7 The last case that I want to spend a few
8 moments on is the one that you find at Tab No. 6. This
9 is the one of Steetley Quarry Products Inc. which my
10 friend referred to at some length. It was the one
11 where the director -- if we want to see where there is,
12 if you turn to page 3 of that case, by way of
13 background it just states that:

14 "...Steetley Industries Limited, a
15 predecessor of the proponent, applied to
16 the Director for a Certificate of
17 Approval for a Waste Disposal Site.
18 Steetley owned and mined a dolomite
19 quarry on the site."

20 So they wanted to convert this to a
21 disposal site.

22 If we turn to page 19 of this case, we
23 will find out what the issue really was about the
24 notice in that case. And I reiterate, I am going
25 through these cases to suggest to you that those cases

1 are ones where indeed the notice was deficient because
2 what was, in fact, before the Board was something which
3 could not be conceived of at the original time because
4 of the nature of the issues before the Board.

5 Now, on page 19 it says in I guess the
6 second full paragraph which begins "The notice..." It
7 stays:

8 "The notice which was circulated in
9 newspapers and otherwise as illustrated
10 in Exhibit 3, notes: 'The total capacity
11 of the adjustment has been calculated to
12 be equal to that originally approved
13 under the provincial Certificate of
14 Approval.' This statement, having regard
15 to the Board's determination of approved
16 capacities, is incorrect. The proposed
17 new contours will result in a 55 per cent
18 increase in capacity."

19 If we turn to page 20, page 20 in the
20 first full paragraph, the last sentence:

21 "Where the notice erroneously states that
22 there will be no capacity change it must
23 follow that it will mislead members of
24 the public on a signature fact."

25 If we go to page 24, at the top of the

1 page, the decision reads:

2 "It is difficult to imagine why the
3 only issue driving the referral to this
4 Board, and indeed this hearing, would
5 have been specifically precluded as an
6 issue by the wording of the application,
7 the referral and the notice. Although
8 the answer may have eluded us, the
9 solution to this dilemma, having regard
10 to the various concerns expressed by the
11 parties, does not."

12 In that case the very issue which caused
13 or gave rise to the hearing was precluded as an issue
14 by the wording of the application.

15 Now, has there indeed been a change in
16 the nature of the undertaking as contemplated by these
17 cases? Has the undertaking or the planning process, in
18 fact, been changed so that they are of an entirely
19 different nature?

20 Firstly, I would suggest, based on these
21 cases, the situation that is before this Board is
22 nothing similar to the clear prejudicial situations
23 arising in those cases.

24 Secondly, I refer back to a comment made
25 by Mr. Martel during the submissions of my friend and

1 the comment I refer to is the comment about the
2 environmental assessment document, Exhibit No. 4, and
3 the Timber Management Planning Manual being Exhibit No.
4 7 having been around here for a long, long time and it
5 is my submission that the undertaking has not changed
6 in nature, the planning process has not changed in
7 nature. What you have before you are additional
8 obligations which the Proponent has seen fit to suggest
9 should be imposed upon itself in relation to the very
10 subject matters which are described in those two
11 documents.

12 I would suggest that for my friend to say
13 that other members of the public might be prejudiced in
14 some way by not knowing about all of these details
15 because they couldn't have contemplate all of these
16 details, they may not have been able to contemplate all
17 of these changes which the Proponent has suggested be
18 imposed on itself, but all of these changes have been
19 made, No. 1, in response to positions taken by other
20 parties at this hearing. They are providing more of
21 the protection that people have been asking for and
22 which the Environmental Assessment Act suggests should
23 be provided than was in the original document.

24 It is providing more opportunities for
25 public consultation as part of a planning process which

1 class environmental assessments always, in fact, deal
2 with.

3 To suggest that the people out there, if
4 they knew about all of these additional things were
5 going to be included would say: Oh, now that these
6 additional protections are going to be provided I am
7 going to get involved in my submission just doesn't
8 hold any water.

9 My friend has referred to the wording in
10 the Ministry's witness statements in relation to reply
11 evidence and they refer to major changes.

12 Madam Chair, the Ministry of Natural
13 Resources sticks by those words. Those changes are
14 major changes. The terms and conditions are major
15 changes which the Ministry of Natural Resources is
16 proud about making, but they are not, in my respectful
17 submission, changes which fall within the tests set out
18 by the courts.

19 They are not changes, in my respectful
20 submission, which cause the undertaking or cause the
21 planning process to be of an entirely different nature.

22 They are of the same nature. They are
23 just more of the same nature. Putting it another way,
24 the fact that the Proponent is making major changes in
25 the context of this hearing or in the context of timber

1 management is not the same thing as saying that there
2 have been changes in the undertaking or the planning
3 process which are entirely different in nature. One is
4 not the same as the other.

5 Mr. Martel, you like quizzical.

6 MR. MARTEL: Do you want to run that one
7 by me again.

8 MR. FREIDIN: All right. There can be
9 changes -- the planning process is of a certain nature.
10 It is a planning process which has provisions for
11 public notice, it has provisions for information
12 centres, it has provisions for appeal procedures, it
13 has public consultation.

14 My submission is that if the Proponent
15 provides more details and says I will oblige myself to
16 do more in relation to public notice, information
17 centres, appeal procedures, the nature of the planning
18 process, the nature of it hasn't changed. The
19 Proponent has just said I want to do more. I want to
20 respond to the concerns of other people who want us to
21 do more.

22 So I am saying that the nature of the
23 planning process has not changed. The same
24 ingredients, same essential subject matters are
25 addressed, but the Proponent wants to do more to

1 address the concerns of the public, to address the
2 concerns raised through negotiations, and I say the
3 same thing in relation to the undertaking. The
4 position of the Proponent is that the undertaking has
5 not changed at all.

6 Now, I know my friend has made
7 submissions that the planning process is part of the
8 undertaking. In my submission, the Board can revisit
9 that decision when and if it thinks it is appropriate
10 to do so. I am not asking the Board to revisit that
11 decision at this time. I might at a later time, but I
12 am not going to do that today because in my submission
13 even if the planning process is part of the undertaking
14 for the reasons I have just given to you, the nature of
15 the undertaking, if the undertaking is the planning
16 process, has not changed. The nature of it hasn't
17 changed.

18 We are certainly still only asking for
19 approval to undertake the activities of access,
20 harvest, renewal and maintenance. The nature of that
21 hasn't changed. We are not asking to build a Hydro
22 dam, we are not asking to build a waste disposal site,
23 we are not asking like in southwest Hydro or in these
24 other cases to carry out these activities in a
25 different area.

1 You may recall we visited that issue way
2 back early in our case about whether we could have a
3 provision of approval that we could amend the area of
4 the undertaking. There was some concern that: Oh gee,
5 you can't do that because if you start going into
6 another area people may not have notice. We heard
7 that. We don't have that. We don't recommend that
8 anymore.

9 So we are not making changes of the kind
10 made in these case where the courts say: Hey, you have
11 changed the whole nature of this thing.

12 Now, let me go back a bit and make a
13 submission about what struck me when I first looked at
14 this Notice of Motion. Why is it really being brought.
15 It is being brought, in my respectful submission,
16 because the Coalition is taking the position that it
17 has taken before this panel and before the funding
18 panel on a number of occasions and that is, it has not
19 received funds which it feels is sufficient or
20 warranted to persue its case.

21 That's what this motion is all about, in
22 my respectful submission. It is not really a motion
23 which is being brought there is this great concern that
24 the original notice was somehow improper.

25 Lawyers are asked to make submissions on

1 behalf of clients and I don't say this as a criticism
2 of my friend, but what I would respectfully submit is
3 that they sat back and they figured out, how can we get
4 some more money and they concocted a legal argument
5 which looked like it had the best chance of getting
6 somewhere.

7 In my submission, if I am correct, the
8 submissions of my friend should be looked at perhaps
9 with that in mind.

10 MR. O'LEARY: You are off my Christmas
11 mailing list.

12 (laughter)

13 MR. CASSIDY: Is that everybody else who
14 agrees with it?

15 MR. FREIDIN: I'm Jewish. I don't mind.

16 (laughter)

17 Now, my friend says that all these other
18 people would be prejudiced if they didn't have notice.
19 I have dealt with that, but I am going to come back to
20 another issue on that. No, let me deal with something
21 further on that. Have these people really been
22 prejudiced? Do these people really not know what is
23 going on?

24 Madam Chair raised a point and that was,
25 all of these transcripts being deposited all over the

1 province at great expense. I think it would be
2 constructive to in fact look at what that notice does
3 say about what kind of information is provided to the
4 public as this hearing has been ongoing day after day
5 so that they can determine what is happening, what
6 exhibits are being filed, they read the transcripts,
7 the terms and conditions are going to be filed in a
8 certain time, that negotiation sessions are scheduled
9 for, you know, this day or that day and reports are due
10 on these dates.

11 It is not as if the public has been left
12 in the dark about these things. These transcripts have
13 been made available all across this province as a
14 result of the very first notice, the notice which my
15 friend characterized as inadequate.

16 The people who got notice of this hearing
17 not only were advised that they could look at the
18 environmental assessment document, the Timber
19 Management Planning Manual, the government review, they
20 were told that -- I would ask you to take the motion
21 record filed by Ms. Seaborn on behalf of the Ministry
22 of the Environment and turn to Tab No. 2.

23 At Tab No. 2 we have the directions for
24 notice and we have attached the notice, Schedule A.
25 Well, we have got a map, so we certainly don't have the

1 problem that they had in the southwest Hydro case, but
2 more importantly if we turn to page 6, we have in the
3 middle, in addition to telling people about the
4 hearings and where they are going to be at -- and, by
5 the way, just so I don't forget, a point made by you,
6 Madam Chair, about the Board giving anybody who
7 appeared status and providing people with copies of
8 things when they called on the phone should not go
9 unconsidered in determining whether in fact there has
10 been any prejudice.

11 Looking at page 6 of the actual notice,
12 it says:

13 "The Board accepts collect calls. A
14 toll-free information number will be
15 provided throughout the hearings to
16 provide prerecorded information as to the
17 status of the proceedings. The toll-free
18 number can be obtained by contacting the
19 Board upon commencement of the hearing.
20 Transcripts of the evidence heard at all
21 public hearings will be available to the
22 public for review at the following
23 locations five working days after the
24 hearing of evidence. The Environmental
25 Assessment Board in Toronto..." a whole

1 lunch of libraries indicated, a number of Ministry of
2 Natural Resources' offices.

3 Those opportunities have been there for
4 the public to follow what's going on. In my respectful
5 submission they by themselves adequately address the
6 concern that my friend has regarding notice not
7 being -- or continual notice of what is going on not
8 being available to the public of Ontario.

9 In addition, as you noted, Madam Chair,
10 the Board has travelled to a number of different
11 locations across northern Ontario. There is a display
12 up there by a number of parties. The people come
13 forward and there is the opportunity to get information
14 in relation to these matters, different kinds of
15 documents are out there for people to look at and ask
16 questions about the hearings.

17 I am not privy to calls that the liaison
18 officer of your Board may get from the public, but
19 those are all additional opportunities which have been
20 provided to the public to keep in touch with what is
21 going on, over and above which I think what would by
22 itself be adequate to deal with this concern about
23 keeping the public advised and that's the availability
24 of these transcripts across the province.

25 Now, my friend has compared the EA Act --

1 pardon me, in certain parts of his submission he
2 compared the environmental assessment, Exhibit No. 4,
3 with the terms and conditions, the draft terms and
4 conditions filed by the Ministry on January the 6th,
5 1992.

6 I was going to make the submission that
7 this is in fact an environmental assessment in relation
8 to an ongoing undertaking. In fact, it was point that
9 you raised yourself, Madam Chair. This particular
10 undertaking, and I said this in my opening remarks on
11 May the 10th, 1988, is different than any other
12 undertaking that I am aware of, at that time anyway,
13 having come before the Board and it was the
14 environmental assessment of an ongoing undertaking.

15 It is not an undertaking of some new
16 capital structure that's going to be put out to the
17 environment for the first time. It is not an
18 undertaking that is frozen in time. It is unrealistic
19 to, in fact, think that that could ever be the case.

20 My friend refers to certain silvicultural
21 guides, most of which he says came into being since the
22 hearing started. Well, how can anybody complain about
23 that? I mean, we have an ongoing undertaking. The
24 option of coming out with new silvicultural guides
25 partly in response to concerns by people that they

1 don't know perhaps -- well, concerns of some people is
2 to say: Well, we won't do anything new. We won't
3 progress, we will just stay back there and you
4 criticize us for all these things but we are not going
5 to change, we are not going to move ahead, we are not
6 going to provide more direction and guidance to our
7 staff because if we do the whole hearing is going to go
8 up in smoke.

9 To suggest that that is what a proponent
10 should do is, in my submission, without merit and is a
11 submission which would grind undertakings such as
12 timber management to a halt if taken as they have been
13 made to.

14 When I was sitting there actually
15 listening to him - sort of an aside - I was saying:
16 Gee whiz, is he really saying that because of this
17 undertaking, ongoing undertaking, which is so complex
18 in which obviously you cannot have a hearing in two
19 months, does that mean that we really shouldn't be
20 having an environmental assessment in relation to
21 timber management. The Environmental Assessment Act
22 maybe doesn't even apply to timber management because
23 it is ongoing.

24 That is what it sounded to me that he was
25 saying. That is the logical extension of what he is

1 saying. You can never have an environmental assessment
2 if what my friend suggests is the case.

3 By the way, I am not taking the position
4 that the Environmental Assessment Act does not apply.
5 It does apply to timber management. That's the logical
6 extension of what he is saying.

7 MR. MARTEL: I'm glad.

8 MR. FREIDIN: I didn't want the Minister
9 on my back. That's all.

10 Now, the position that has been expressed
11 by my friend on behalf of OFAH and NOTO, in my
12 respectful submission, is inconsistent with the
13 principle enunciated by this Board or the joint Board I
14 think in the Red Hill Creek Expressway case and which
15 has been followed by this Board on many occasions. I
16 think it is the principle that my friend basically
17 referred to you in which he indicated is good law and
18 that is that the environmental assessment is not just
19 the environmental assessment document, but it is the
20 evidence that is in fact put in when in fact there is a
21 hearing.

22 The environmental assessment process has
23 been described as an evolving process. It is one where
24 it is expected that things evolve and that improvements
25 are made as a result of proponents in particular

1 adopting parts of the philosophy of the intervenors or
2 some of specific suggestions made by intervenors.
3 That's what it is all about.

4 So I would submit to you that the
5 position that's being put forward is inconsistent with
6 that particular principle.

7 In that regard and also in regard to my
8 early submissions about the nature of the undertaking
9 not changing, I would like to refer you to a decision
10 which just came out yesterday. A decision of the
11 Environmental Assessment Board in the demand/supply
12 hearing.

13 Now, that particular decision, Madam
14 Chair, is - again thanks to the quick work of Ms.
15 Seaborn - included in her book of cases, but
16 unfortunately I can't find mine. Here it is.

17 You will find that decision at Tab No. 4.
18 In a nutshell, an issue very similar to the one before
19 you, Madam Chair, arose at that hearing. Hydro, and I
20 am summarizing, changed the nature of what they were
21 seeking approval for.

22 Originally they were asking for approval
23 for a plan which contemplated a combination of nuclear
24 power, hydroelectric power, cogenerated power, et
25 cetera. They filed an exhibit, Exhibit 452, on January

1 the 15th of this year which, in effect, said we are not
2 going to go ahead anymore with nuclear power. Without
3 going into the details, the other kinds of power were
4 not going to be relied on in the same way.

5 Now, what happened was, some of the
6 parties say: Lookit, you changed the nature of your
7 undertaking. I mean, you were asking for approval to
8 carry out nuclear generated power or produce nuclear
9 generated power, coal fire. You have changed it
10 substantially. It is not even the same application.

11 You will see that raised on page 4 of the
12 case. It says:

13 Under the heading the Jurisdiction Issue:

14 "It is the contention of MEA..." and MEA
15 stands for the Municipal Electric Association,

16 "...supported by the Consumer Association
17 of Canada that Exhibit 452 set out a
18 fundamental change in the undertaking
19 and that the Board has no jurisdiction to
20 consider it. From this it follows that
21 the application by Ontario Hydro to be
22 dismissed and that Ontario Hydro may
23 then, if it sees fit, submit new
24 environmental assessments."

25 That was the position taken by the

1 Municipal Electric Association and the Consumers
2 Association of Canada.

3 The Board in that case, and Mr. Justice
4 Saunders who, as you are aware, is not only the
5 Chairman of that panel, but also a justice of the
6 Supreme Court.

7 MR. O'LEARY: General Court.

8 MR. FREIDIN: Used to be. Thank you. I
9 have been away from that court for so long I can't keep
10 up with who is coming and going.

11 If you look at page 6 -- by the way, what
12 happened was they dismissed the application. They say
13 there is no fundamental change. They cited - I will
14 show you where - the southwest Hydro case and they said
15 based on the tests set out there, whether there was an
16 undertaking which was different in nature, they said
17 no, no, that's not the case. You find that discussion
18 starting at the top of page 6. It says:

19 "In Exhibit 452 the undertaking is
20 described in language identical to that
21 contained in the DSP, but the approvals
22 for major supply associated with
23 candidate Plan 15 are no longer
24 recommended. Instead, Exhibit 452 sets
25 forth in effect a new candidate plan with

1 related approvals which is now
2 recommended."

3 It indicates in the next paragraph, in
4 the second line:

5 "The position of Ontario Hydro is that
6 the undertaking has not changed."

7 It goes on and says in the middle of the
8 paragraph:

9 "Hydro is basically saying that Exhibit
10 452 does no more than describe another
11 method of carrying out the undertaking.

12 Albeit, it is now the recommended method
13 for which approval is sought."

14 If we go down to the very last paragraph,
15 the last two lines where the meat of where I want to
16 refer you to starts, the Board in this case states:

17 "It is the position of the Municipal
18 Electric Association and the Consumer
19 Associations of Canada that there can
20 minor changes made in the undertaking by
21 a proponent in the course of a hearing,
22 but they submit that a fundamental change
23 requires the submission of a new
24 environmental assessment and a fresh
25 review by the Minister. In our view

1 that strict position ignores the dynamics
2 of a planning hearing extending over
3 several years and places unnecessary
4 restraints on a proponent. To adopt it
5 would make the process unduly lengthy,
6 expensive and perhaps unworkable. To
7 carry out its mandate, Ontario Hydro must
8 be able to make changes in the planning
9 that it considers necessary."

10 And they go on:

11 "However, there may be cases where the
12 change is of such a magnitude that the
13 statutory process must begin again with a
14 new assetment and a ministerial review."

15 They cite the southwest Hydro, the very
16 portion that you heard now about from both Mr. O'Leary
17 and myself.

18 They continue at the bottom of the page:

19 "While recognizing that it is the
20 position of Ontario Hydro that there has
21 been no change in the undertaking..."

22 And that's the same submission we are
23 making to you as well, there is no change in the
24 undertaking.

25 "While recognizing that it is the

1 position of Ontario Hydro that there has
2 been no change to the undertaking we are
3 of the opinion that a proponent is
4 entitled to propose a change in the
5 undertaking in the course of a hearing.
6 If that occurs, jurisdiction is not lost,
7 but the rules of natural justice apply
8 and the Board must examine the degree of
9 change and decide how to proceed to carry
10 out its statutory duty. In certain cases
11 it must be necessary to terminate a
12 hearing."

13 I cite that because, in my submission,
14 Madam Chair, for the reasons I have already submitted
15 the Proponent says that there is no change in the
16 undertaking.

17 If, in fact, the Board is of the view
18 that there is a change in the undertaking as a result
19 of the changes in the terms and conditions; in other
20 words, you don't agree with my earlier submission, I
21 would submit based on this reading that one is entitled
22 to do that and then we get to the question: Are they
23 changes which are of such a nature that they in fact
24 fall within the web of the southwest Hydro decision.

25 Are they changes which, in fact, cause

1 the undertaking or the planning process to be different
2 in nature?

3 I made my submissions as to why I think
4 that's not the case. In my submission this case of
5 southwest Hydro, the changes which occurred in this
6 case -- you have to look at each case on its facts. My
7 submission to you is that this case was a more
8 substantial change than the kind of changes which the
9 Proponent has clearly stated it is making and as
10 describe in its draft terms and conditions.

11 If I am right, if this case is a more
12 substantial change than the kind -- than what you see
13 described in the Proponent's terms and conditions, then
14 I would submit to you the conclusion you should come to
15 is saying, if it's not, you don't have to have a new
16 hearing and new notice in that Hydro case where the
17 change was really quite substantial, then obviously
18 because we find that the changes in the timber
19 management EA nothing of that nature, they are
20 insignificant in comparison, I submit to you that you
21 should find that in fact they have the same result; no
22 prejudice to anybody as a result of the notice, no need
23 for additional notice, certainly no need to be
24 concerned about a new hearing because someone is going
25 to say that the original notice wasn't sufficient.

1 If we take the Coalition's argument to
2 its logical extension what they would be saying is:
3 Ministry of Natural Resources, we have suggested a
4 whole bunch of terms and conditions and let's assume
5 for the purpose of my submission that all the terms and
6 conditions that they have proposed are within the
7 jurisdiction of the Board to in fact impose.

8 Let's say the Proponent says: Gee, they
9 are really good, we love them, and we are going to
10 adopt every one of them because we think you have got
11 the best idea around. Are they going to get up and
12 say: My God, have you ever changed the undertaking.

13 You have adopted 228 terms and conditions
14 and all that detail and they say: Ah, but even though
15 you have done that we have got to give them notice and
16 we might have to start the hearing over again because
17 you have really changed the undertaking substantially.
18 That's the logical extension, in my respectful
19 submission, of their illogical argument.

20 The last sort of point on that is the
21 message that submissions made by the Coalition in fact
22 convey to this Board and to other panels. I mean, this
23 particular panel and other panels. This Board has
24 instituted a number of progressive steps to in fact
25 facilitate this environmental assessment process.

1 It has introduced the idea of having
2 terms and conditions filed earlier as opposed to at the
3 end of the case so that the Board and the other parties
4 know where everybody is coming from.

5 The Board has taken the novel step of
6 suggesting that there be negotiations to try and get
7 some of these issues off the table to make the process
8 work, not to be as lengthy.

9 It is through those initiatives to a
10 great degree that the major changes about which the
11 Ministry is proud have, in fact, resulted and is my
12 friend sending the message out to this panel and other
13 panels that don't be progressive, don't try and
14 facilitate the process, don't try to get the parties
15 together and work up something which is more
16 acceptable.

17 In my respectful submission that's the
18 message that he is sending out. If one wanted to say
19 that -- well, again, if you look at the actual changes,
20 they are all changes which are positive. There is
21 nothing being taken away from anybody. It is all just
22 more of the sorts of things that the public wanted that
23 are all within the nature of the planning process which
24 was originally put forward, they are all within the
25 nature of the undertaking as described by the

1 Proponent, access, harvest, renewal and maintenance.

2 Madam Chair, you asked the question about
3 whether the situation would be any different if there
4 were no terms and conditions, if what we were dealing
5 with here were just witness statements that talked
6 about reply evidence.

7 In my submission it seems to me that when
8 I stand back and look at this it is because we have
9 terms and conditions early that my friend is somehow
10 saying the undertaking has changed.

11 It is my submission that if the Ministry
12 filed its witness statement without terms and
13 conditions and said: We want to put in our reply
14 evidence now, we have heard in everybody else's case
15 about more public participation, more empowerment to
16 the public, a number of things, if the Ministry files a
17 witness statement and says: All right, in that case
18 that's what they said, they said they wanted ten
19 things, the Ministry thinks five are good and we think
20 they are good for these reasons, we think five aren't
21 good for these reasons and we just stopped there and no
22 one knew why we did all that, you would only find out
23 at the end when all the evidence was over and we put in
24 our argument and we would say: Well, here is what we
25 want.

1 I would submit my friend would not be in
2 a position to get up and say: Gee, there is something
3 wrong with that reply evidence. It seems to me he is
4 just complaining because the terms and conditions
5 somehow have come early and it is for that reason that
6 I say that he is really stifling or sending a message
7 out that we shouldn't try and do anything to facilitate
8 the process.

9 In relation to that issue about whether
10 what has been put in as reply evidence or proper reply
11 evidence, my friend did make a comment that he felt
12 that the material filed here perhaps wasn't proper
13 reply evidence. That is an issue which was not raised
14 in the Notice of Motion. It was not raised as a ground
15 upon which they were seeking the relief they are asking
16 for and I was, therefore, not prepared to make
17 submissions in that regard and I respectfully submit
18 the Board not make any ruling based upon that
19 suggestion.

20 The Ministry -- pardon me. As you noted,
21 Madam Chair, a date has been set aside for counsel to
22 get together to discuss the views of the various
23 parties as to the propriety of the reply evidence being
24 proposed by the Ministry of Natural Resources and that
25 meeting is scheduled for a number of weeks from now.

1 If my friend has some concerns about that issue, about
2 the propriety of the reply evidence, then he can raise
3 them then and if we have to come back here and have
4 another motion about whether it is proper or not, then
5 that is the time to deal with that issue and not bring
6 it in through the back door on this particular motion.

7 My friend, went he to witness No. 3 I
8 guess and he went to that last page he said: Look at
9 all these new changes, new research about this and new
10 research about that, full tree harvesting, growth and
11 yield, you name it.

12 Well, whether the planning process is
13 part of the undertaking or whether it's not, research
14 in relation to all those good things, in my respectful
15 submission, is neither the undertaking as defined by
16 the Proponent, access, harvest, renewal and
17 maintenance, or the undertaking even with the planning
18 process. It is not the activities and it is not the
19 planning process. It is something completely
20 different.

21 So to go there and say: Look at the list
22 and all these things are new and new proposals about
23 this and that is just an indication, in my respectful
24 submission, that the Proponent is a responsible
25 Proponent, is recognizing that improvements can be made

1 in terms of management over the long term. It has said
2 because of that we are going to do the following
3 things. It is not in relation to the undertaking per
4 se, it is not in relation to the activities and how you
5 carry them out and it is not in relation to the
6 planning process.

7 My friend made a brief reference to
8 Section 23 of the Environmental Assessment Act. He
9 made that reference in relation to I believe the issue
10 as to whether the Board can order the issuance of a new
11 notice. If I am wrong, Mr. O'Leary, you can correct
12 me. My notes are not clear on that.

13 In any event, Section 23 of the
14 Environmental Assessment Act states:

15 "Within 28 days after receipt by the
16 Minister of a decision of the Board on
17 any matter referred to by the Minister
18 pursuant to subsection 12(2)..." et
19 cetera,

20 "...the Minister with the approval of the
21 Lieutenant Governor in Council may
22 designate..." They can vary the order or
23 whatever.

24 Now, he referred to that section and he
25 relied on it for some proposition which included the

1 suggestion that this section somehow has relevance to
2 this Notice of Motion, to this motion which is before
3 the Board today. Somehow it becomes final in 28 days.

4 Well, in my respectful submission that
5 section has got nothing to do with this specific Notice
6 of Motion.

7 In my submission Section 23 of the
8 Environmental Assessment Act, when it refers to "a
9 decision of the Board on any matter referred" to it is
10 referring to, as it says here, any matter referred to
11 it by notice of the minister pursuant to Section 21(2)
12 and that just means that the decision which has been
13 referred to the Board under 12(2) is the decision to
14 make -- is to make a decision in relation to the
15 acceptability of the environmental assessement and, if
16 acceptable, the approval of the undertaking. That is
17 what is referred to.

18 That is the kind of decision which is
19 referred to in Section 23, not this Notice of Motion
20 which is what they call an interlocutory motion. It is
21 a motion within the context of the whole hearing. It
22 is not the kind of decision that is referred to in
23 Section 23, in my respectful submission.

24 The last point I want to address is one
25 as to what the Board can do if it should find that the

1 original notice was insufficient. My friend referred
2 you to the case which is found at Tab 6 which is
3 Steetley Quarry. I believe it was that case which set
4 out at page 18 a number of options that would be
5 available if the Board was concerned about the original
6 notice and I think he suggested that there was a fifth.

7 If I am not mistaken, the fifth in fact
8 is the very relief that he is requesting in his Notice
9 of Motion and that is that the Board -- I just want to
10 find specifically where it is, that the Board actually
11 order the issuance of a new notice.

12 If you look at their Notice of Motion, at
13 Tab No. 1 of the Coalition's motion factum which is the
14 smaller of the two blue books, they are asking for the
15 specific relief on page 2. They ask for a decision and
16 direction requiring the issuance under the Statutory
17 Powers Procedure Act of a new notice of public hearing
18 on or before March 31st, 1992.

19 It is my respectful submission, Madam
20 Chair, that this Board does not have the power to order
21 the issuance of a new hearing which, as has been
22 suggested by my friend, would indicate that the
23 Proponent has now put before the Board a new
24 undertaking.

25 It is my submission that if the Board

1 should find, and I made a submission as to why you
2 shouldn't find this, but if you should find that the
3 original notice was inadequate and that the hearing
4 shouldn't proceed because of the inadequacy, the proper
5 order to make is the kind of order which was actually
6 made in this particular case at Tab No. 6.

7 The actual decision of the case set out
8 at Tab No. 6 is found at page 24 of the case. You will
9 recall my friend basically indicated that a new notice
10 perhaps went out in this case, but if you start at the
11 second full paragraph, this is after they found that
12 the notice was inadequate, they say:

13 "In view of the fact that the director
14 has by correspondence and through counsel
15 indicated his preference that the Board
16 proceed with a hearing on the issue
17 of capacity, as well as the matters set
18 out in the application, we expect that
19 the director would permit Steetley to
20 amend its application if it so chooses at
21 this stage."

22 I emphasize the words "if it so chooses."

23 If you go down to the last paragraph, the
24 second last line, after going through what this notice
25 might say if they so choose, the actual decision was:

1 "In the event that the appropriate
2 amendments to the application and the
3 resulting revisions to the director's
4 notice of referral are not made in a
5 timely fashion the Board would entertain
6 a motion brought by one or more of the
7 parties for an order dismissing the
8 application."

9 If you look at the actual decision, item

10 No. 2:

11 "The hearing is adjourned sine die
12 pending amendment forthwith of the
13 application by the proponent, if it so
14 chooses, to reflect the findings of the
15 Board as set out in paragraph 1 herein."

16 So really what you do, the proper
17 procedure for the Board to follow, if you accept the
18 submission that the original notice was inadequate, is
19 to so find and say that it is inadequate and adjourn
20 the hearing sine die which means basically -- well,
21 adjourn the hearing until some set period of time and
22 if the Proponent decides that it wants to put forward a
23 new undertaking it will do so, but it is up to the
24 Proponent to choose whether in fact a new notice is
25 going to be given in the face of the Board's decision

1 or not.

2 Also, if I might refer you to page 17. I
3 don't usually anticipate submissions by other counsel,
4 but I want to do this now and it will be short and take
5 away the necessity hopefully of me getting up and
6 saying I want to say anything something else.

7 If you look at Section 17 -- pardon me,
8 Section 12 of the Environmental Assessment Act.
9 Section 12, as you are aware, is the section where the
10 minister can require the Board to hold a hearing. You
11 find that in Section 12(2).

12 In 12(3) it talks about the subject
13 matter of notice and it says:

14 "Upon receipt from the Minister of a
15 notice pursuant to subsection (2) or
16 Section 13 or Clause 32(1)(c) the Board
17 shall appoint a time for the hearing to
18 give reasonable notice thereof to the
19 proponent and to the Minister and in such
20 manner as the Minister may direct notice
21 to the public, to any person who has made
22 a written submission to the Minister
23 pursuant to subsection 7(2) and to such
24 other persons that the Minister considers
25 necessary or advisable..." and then I

1 highlight the words,

2 "...and such other notice as the Board
3 considers proper and shall hold the
4 hearing."

5 Now, in my respectful submission the
6 phrase "and such other notice as the Board considers
7 proper" is referring to notice of the hearing at the
8 outset of the hearing as a result of the matter being
9 referred to the Board by the minister under Section
10 12(2).

11 What I am saying is that in my respectful
12 submission those words "and such other notice that the
13 Board considers proper" were not intended, if you
14 really read the section, what it is all about, it is
15 not intended to give the Board the power to issue
16 notices in the sort of circumstances that my friend is
17 suggesting that you so order.

18 Madam Chair, I forgot to mention or refer
19 to one part of the southwest Hydro case and I should do
20 so in order to proper fulfill my responsibilities, I
21 think, as an officer of the court, if you will.

22 I made submissions about the significance
23 in this particular hearing about transcripts available,
24 being made available. That, in fact, remedies any
25 concern that one would have about people not knowing

1 what was going on.

2 I should refer you in fairness to a
3 section of the Hydro case which again is found at Tab
4 No. 3 and it is at page 747 of that case. They said in
5 that case, starting down the paragraph, just below the
6 E on the left-hand margin - you will recall this is
7 where the notice didn't indicate where the Hydro line
8 was going to go in fact where it ended up going:

9 "Even if the Board had seen fit to permit
10 those who failed through inadequate
11 notice to address the plan stage issues
12 without the necessity first to obtain
13 leave I question if those people would
14 thus have restored to them the full
15 rights they had been denied. They have
16 lost, I think irretrievably, the right to
17 which they were entitled to contest the
18 issue from the start. They did not hear
19 the evidence taken over 35-days of
20 hearing. They cannot, at this stage,
21 cross-examine upon evidence already
22 received. Even with transcripts they
23 cannot now be given given the same
24 opportunity that they should have had. I
25 can see no way in which the rights of the

1 group represented by Mr. Smith can be
2 restored to them by further hearing
3 before this Board."

4 I cite that to you, Madam Chair, because
5 it sounds like it is similar to the case before you,
6 but I submit to you that it is not applicable in this
7 case. It is distinguishable from this case on the
8 important basis that the people who were prejudiced in
9 that case, in the southwest Hydro case, who would sort
10 of be not made whole by being able to review the
11 transcripts were people who had no idea, who the court
12 found could not reasonably have had any idea that what
13 was being discussed at that hearing was something which
14 was going to happen in their part of the province or
15 was something which could affect their lives.

16 That, as you have indicated, Madam Chair,
17 is clearly not the case in respect of the class
18 environmental assessment into timber managment because,
19 as you have indicated and I would agree with your
20 comment, that this undertaking affects everyone in the
21 province.

22 The notice was given widely across the
23 entire area of the undertaking and outside the area of
24 the undertaking. If took the form of written notices,
25 newspapers, radio announcements and, therefore, is a

1 different situation than the situation faced by these
2 people in southwest Hydro who didn't have any idea what
3 was going on, that it could possibly affect them.

4 I was not able to and I must admit I
5 didn't look that closely to see whether in the
6 southwest Hydro case there were even transcripts filed
7 in other areas of the province, but that I guess would
8 probably be a bit of a red herring because the
9 important point is that the people who you would expect
10 to read them would be people who had notice that
11 something was going on that might affect them and they
12 had absolutely no notice.

13 You can't, in my respectful submission,
14 make the same comment about people who live in this
15 province if we are talking about the class
16 environmental assessment in timber management.

17 Madam Chair, for all those reasons I
18 would submit that the motion brought by the Coalition
19 be dismissed. Those are my submissions.

20 MADAM CHAIR: Thank you very much, Mr.
21 Freidin.

22 Mr. Colborne, did you wish to speak to
23 the Board now?

24 MR. COLBORNE: I had indicated that I
25 expected I would be brief and, indeed, Mr. Freidin

1 covered the points that I would have wanted to make and
2 I find myself in some substantial agreement with him,
3 but oddly enough I also find myself in agreement in one
4 respect with the submissions from the Coalition and I
5 will deal with these submissions in common-sense terms
6 rather than referring to anything that's before you
7 which I suggest is more than adequate; that is, the
8 material before you I believe is more than adequate.

9 It is suggested by the Coalition that
10 there has been a change of the undertaking here such
11 that we now have an undertaking of an entirely
12 different nature as that phrase has been used in these
13 cases and in the decision of the Board -- the recent
14 decision of the Board in the Ontario Hydro DSP hearing.

15 My agreement with Mr. Freidin is that, in
16 fact, there is no change here of the undertaking into
17 one of an entirely different nature and that all we are
18 seeing is that reality keeps -- I think there is a
19 comment that I saw somewhere, reality is what keeps
20 happening while you are making plans. I think that is
21 really all that has taken place here. That may have
22 been from a fortune cookie, it may be no more than just
23 your basic common-sense proposition, but I do agree
24 with Mr. Freidin that things cannot be frozen and that
25 all the parties quite realistically must recognize that

1 the world keeps happening while the Board has these
2 matters under deliberation.

3 I, myself, have some involvement with
4 with the Hydro hearing and I don't mind saying to you
5 that the change there from the perspective of my
6 client, which is not the same client that brings me
7 here, was quite a bit more dramatic than the change
8 that one finds here. Maybe all that we can derive from
9 this is that in a long, complex hearing examining a
10 subject matter as broad as the one here that inevitably
11 there will be continuous changes imposed upon the
12 hearing process.

13 The other main thrust of the Coalition
14 argument; that is, other than whether we have here a
15 change of the undertaking, one of a different nature,
16 seems to me to focus on what is notice and the adequacy
17 of notice.

18 My thinking and my submission is that the
19 notice that we refer to in these discussions is not a
20 piece of paper or wording that may have been created a
21 few years ago, but notice is in fact the information
22 that's conveyed, whether it is conveyed or not, and to
23 whom it is conveyed and I cannot escape from the
24 conclusion that the hearing itself, this hearing does
25 constitute notice day in and day out to the public,

1 that this is not something that's taking place within
2 the confines of a government ministry, for example.

3 This is a matter that is taking place in
4 the presence of representatives from a number of
5 province-wide organizations with, at least in theory
6 and I believe in reality, very elaborate communication
7 networks back into the broad provincial community, and
8 that if notice in the sense of conveying information is
9 not proceeding through those networks, then you are not
10 going to be able to solve the problem just by taking a
11 piece of paper and putting it in a number of
12 newspapers, that in fact the way that the information
13 is being conveyed now is probably about as effective as
14 one could get.

15 However, having said those things, I do
16 find that there is one aspect to the application which
17 I would suggest that you must take very seriously.

18 I was listening with great interest and
19 sympathy to the application rather than hoping that I
20 would be able to rise having examined the matter and
21 say that I agreed with it in its entirety, and I was
22 hoping to do that because of the consequence that would
23 flow from it.

24 I want to suggest that even though the
25 substantive arguments as to the change of the

1 undertaking and notice ought not to succeed in my
2 submission, that you must take very seriously indeed a
3 suggestion that a party is being prejudiced by anything
4 that is brought to your attention.

5 I notice in the affidavit of Dr. Quinney
6 that he has said that the parties for who he is
7 speaking under oath in this affidavit are suffering
8 irreconcilable prejudice.

9 The reasons are suggested in the
10 submissions of Mr. Freidin I believe and that is that
11 this hearing is rather an orphan under the Intervenor
12 Funding Act. It is not simply not there and, no doubt,
13 intentionally not there and, therefore, the funding
14 that brings some of the intervening parties here is not
15 controlled in any sense by that Board, but in fact by a
16 differently constituted panel of this Board.

17 Now, in fact, matters keeping arising,
18 and they have certainly arisen in the case of the
19 parties who Dr. Quinney was speaking for, unanticipated
20 procedural matters, the negotiation of terms and
21 conditions, evidence from new parties that have been
22 added, the reply that we will be hearing, the final
23 argument and all of these essential matters before this
24 hearing which have resulted in at least one party
25 having to come before you and saying it is

1 irreconcilable prejudiced. I don't mind suggesting
2 that some other parties may also be in the same
3 situation.

4 My reason for mentioning this is not to
5 say that the motion as constituted ought not be
6 dismissed. That is my submission. I think it should
7 be dismissed. I cannot agree with the legal bases that
8 were argued for its support of the motion, but I would
9 also suggest that it is certainly within your power to
10 note with concern that this party has brought to your
11 attention a matter of prejudice and prejudice is
12 something which must always be of concern to any
13 hearing panel.

14 I, at least on behalf of my client, have
15 added my voice to that. Not by way of evidence, but
16 merely by way of submissions, that there may be in fact
17 be a prejudice problem arising here which should be
18 addressed.

19 MR. MARTEL: Can I ask you a question
20 before you sit down?

21 MR. COLBORNE: Certainly.

22 MR. MARTEL: What remedy to this problem
23 would you then advocate if this motion should be
24 dismissed? I think that's what you said, and then you
25 note the concern and we know that Mr. Freidin believes

1 that the motion is in fact really being presented to
2 gain funding. What sort of resolution to the problem
3 is available?

4 MR. COLBORNE: I have given thought to
5 that because I was rather hoping that there might be a
6 straightforward way of addressing it. I don't know of
7 any.

8 I certainly would submit that it is
9 within your power as a Board to note this in your
10 reasons for dismissing the application and that in
11 itself might be of assistance to parties who truly do
12 feel prejudiced.

13 Now, they are going to have to prove
14 their prejudice in another forum and would have to use
15 or take with them to some other place any comment that
16 you think ought to be included in your reasons, but I
17 don't think you can go any further than that.

18 MR. MARTEL: See, it is almost as though
19 we are the wrong arena to fight the battle.

20 MR. COLBORNE: But there isn't an arena.

21 MR. MARTEL: I understand that. That's
22 why I asked the question of you, if our hands are tied
23 and how do you see a way out of it.

24 MR. COLBORNE: Your hands are tied in the
25 sense of being unable to make a binding order, but your

1 hands are never tied with respect to commenting upon
2 matters that have come properly before you.

3 MADAM CHAIR: Is that it, Mr. Colborne?

4 MR. COLBORNE: Yes, thank you.

5 MADAM CHAIR: Thank you very much.

6 Ms. Callaghan is going to need a break at
7 nine o'clock.

8 Who wishes to follow Mr. Colborne?

9 Mr. Lindgren?

10 MR. LINDGREN: Thank you, Madam Chair.

11 Madam Chair, FFT opposes the motion and
12 to be perfectly blunt we oppose it because it has no
13 merit whatsoever and for that reason it has to be
14 dismissed.

15 I find myself in substantial agreement
16 with Mr. Freidin's submissions and I adopt them. I
17 don't intend to repeat them, but I have do have two
18 matters that I would like to highlight and bring to
19 your attention.

20 The first is that FFT strongly disagrees
21 with Mr. O'Leary's suggestion that the new terms and
22 conditions are so substantial, so profound or so
23 fundamental that they require a new notice or that,
24 indeed, a new hearing is required.

25 Madam chair, it is our submission to you

1 that the proposed terms and conditions do not have the
2 effect of materially changing the undertaking and I say
3 that for two reasons.

4 First of all, they are proposed terms and
5 conditions. They are proposals. They in no way bind
6 the Board. You may accept some of them, you may reject
7 all of them, but, in any event, they mean nothing at
8 this point in the hearing. They are just proposals
9 suggested by the Proponent.

10 My second point is this, even if they
11 were accepted by the Board at the end of the day after
12 all of the evidence has been adduced they still would
13 not change the nature of the undertaking. It is still
14 the same undertaking; namely, timber management
15 planning. For that reason it is my suggestion to you
16 that no further notice is required even if you accept
17 all of those terms and conditions.

18 Now, I would like to refer briefly to the
19 actual notice that went out in 1988. It is reproduced
20 in Mr. O'Leary's materials, and I find it significant
21 that Mr. O'Leary never took you to it and I would like
22 you to take you to it. It is found in his factum
23 reproduced at Tab 4.

24 Page 1 of the notice includes a
25 description or a map of the area of the undertaking and

1 we see below that a suggestion that the undertaking is
2 for timber management on Crown lands in Ontario.

3 More significantly, on page 2 we see an
4 explanation of the notice. The first paragraph tells
5 us that the purpose of the class environmental
6 assessment is to obtain approval for this undertaking.
7 The Class EA contains a planning procedure which will
8 ensure that environmental effects and public input will
9 be considered in the planning and implementation of all
10 timber management plans on Crown land in Ontario.

11 Madam Chair, in my submission that is a
12 carefully crafted and comprehensive notice and
13 certainly provides fair and reasonable notice to the
14 public as to what exactly has been going on in this
15 hearing for the last four years. Everything that has
16 occurred, in my submission, is subsumed or caught by
17 this notice.

18 It was a planning process for timber
19 management in 1988 and in 1992 it is still a planning
20 process for timber management. In fact, there may be
21 some parties in this hearing that say that's not good
22 enough. That's an argument for another day.

23 In any event, this is adequate notice for
24 this undertaking and the changes proposed by the MNR do
25 not materially change the nature of this undertaking.

1 It was properly described in 1988. This notice is
2 still effective and it is good notice.

3 My second point, Madam Chair, is simply
4 this, in his submissions, and I say this with the
5 greatest of respect, I believe that Mr. O'Leary has
6 confused the terms environmental assessment and the
7 term undertaking. They are not the same. In fact,
8 they are defined differently and separately under the
9 Environmental Assessment Act.

10 Now, I have reviewed Mr. O'Leary's Notice
11 of Motion and, as I understand it, the specific
12 complaint is that the EA has changed materially since
13 1987. Let's assume that's true. So what?

14 The underlying nature of the undertaking
15 is still timber management planning. That has never
16 changed. It has not changed one degree or one iota
17 since 1988.

18 On the other hand, the environmental
19 assessment is expected to evolve over time. This is a
20 matter that Mr. Freidin touched on. It is well
21 established, Madam Chair, that an EA can and should
22 evolve over long-term, dynamic hearings such as this
23 one.

24 The decisions such as Red Hill Creek
25 Expressway and other decisions by the Joint Board and

1 the Environmental Assessment Board all stand for the
2 proposition that an EA can evolve over the course of a
3 hearing and in some cases that change in the EA may, in
4 fact, result in a change to the undertaking.

5 For example, a municipality might propose
6 to build a landfill and then midway through the hearing
7 the municipality may decide it wants to build an
8 incinerator instead. That is a material and
9 fundamental change to the undertaking that would
10 require further notice.

11 The changes proposed by the MNR today as
12 reflected in their terms and conditions are not changes
13 of that magnitude. They have proposed a number of
14 changes to the timber management planning procedures.
15 Some of these changes we have pushed for, we are glad
16 to see them. Some of the changes we would like to see
17 have not been implemented yet and we will argue that
18 another day, but in any event --

19 MR. CASSIDY: Or another night.

20 MR. LINDGREN: Or another night. In any
21 event, we are quite pleased to see these proposed
22 changes come up now in the hearing as opposed to the
23 end of the day.

24 This gives us an opportunity to see where
25 the Proponent is going and whether or not they are

1 prepared to live with some of the suggestions that we
2 have made. That facilitates public participation.

3 To give effect to my friend's submissions
4 and say or to hold that the Proponent shouldn't
5 consider any changes to what was originally submitted
6 essentially detracts from the whole purpose of a
7 hearing like this. You could never settle a case, you
8 could never negotiate it. There is no sense to even
9 participate if you couldn't suggest any new changes at
10 the end of the day.

11 Madam Chair, in conclusion, the MNR has
12 proposed a change what I would characterize as
13 implementation details or put another way, they have
14 proposed alternative methods of carrying out the
15 undertaking. The undertaking being planning for timber
16 management.

17 The details of timber management planning
18 have changed and will change and that's a good thing,
19 but the undertaking itself, timber management, has not
20 changed as a result of these proposed terms and
21 conditions.

22 For those reasons, Madam Chair, we
23 suggest that the motion must be dismissed.

24 Like Mr. Colborne I find myself in the
25 position of wanting to agree with the positions put

1 forward by my friend. FFT would like to have more
2 supplementary intervening funding available, but this
3 motion is not the proper way to go about securing
4 supplementary intervenor funding.

5 I have to agree with Mr. Freidin that
6 this Board must see this motion as a transparent
7 attempt by the Coalition to secure more funding.
8 That's improper and it is inappropriate.

9 Those are my submissions, Madam Chair.

10 MADAM CHAIR: Thank you, Mr. Lindgren.

11 MADAM CHAIR: We will take a 10-minute
12 break.

13 ---Recess at 9:05 p.m.

14 ---On resuming at 9:15 p.m.

15 MADAM CHAIR: Mr. Cassidy?

16 MR. CASSIDY: Madam Chair, the hour is
17 late so I am going to be short.

18 MADAM CHAIR: We have got all night, Mr.
19 Cassidy.

20 MR. CASSIDY: I support and adopt the
21 submissions of Mr. Freidin and the submissions of Mr.
22 Lindgren inasmuch as he has characterized the changes
23 to the terms and conditions by the Ministry as being
24 changes to the methods of carrying out the undertaking.

25 In my respectful submission this motion

1 has confused the terms and conditions with the
2 undertaking. They are not one in the same thing. I
3 submit that the terms and conditions that any party
4 proposes are, in fact, the methodology by which the
5 undertaking is to be carried out in the fashion that is
6 proposed by the various parties.

7 I am supported in that view by the
8 decision -- or that characterization of them by the
9 decision of Mr. Justice Saunders and the other Board
10 members in the DSP case. I think there is an analogous
11 situation that arose there that I would just like to
12 turn you to very briefly.

13 That decision can be found in Tab 4 of
14 Ms. Seaborn's book of authorities. I want to express
15 my thanks to Ms. Seaborn for her providing that case to
16 us in such a timely fashion. I think it is an
17 exhibition of the appropriate role of Ministry counsel
18 in matters such as this.

19 If you turn to page 4 of that decision,
20 at page 4 you will see that the jurisdiction issues was
21 raised in the context of the two applicants in that
22 case claiming that the - what I am sure in the context
23 of that hearing is the infamous Exhibit 452 - they
24 claim set out a fundamental change in the undertaking.
25 That's right in the middle of the page as characterized

1 by the Board.

2 Then if you turn, however, to page 6,
3 after consideration of that characterization the Board,
4 however, described 452 right in the middle of the page
5 as doing no more than describing yet another method of
6 carrying out the undertaking.

7 Then if you turn to page 8, you will see,
8 again of that decision, you will see on page 8 in the
9 first full paragraph that the Board said the proposed
10 changes incorporated in that exhibit in their view are
11 significant and you might say material here or major,
12 but in our view are of a nature contemplated by the
13 DSP.

14 "The planning methodology has changed
15 because of a perceived change in the
16 uncertainty of future need."

17 My submission is that even if you
18 characterize these as major changes or minor changes
19 they are nevertheless the changes that are discussed in
20 the reply evidence or changes to the terms and
21 conditions which, I submit, is the methodology,
22 planning and otherwise, an operational methodology of
23 carrying out what is still the same undertaking.

24 I agree with Mr. Lindgren. I am still
25 here talking about the same activities and I am still

1 here talking after four years about the same planning
2 process, but there are changes and proposals to it that
3 the various parties are making, again, of a non-binding
4 nature on the Board.

5 I submit that we are in a very analogous
6 situation to the Hydro case where we have a methodology
7 proposed and we have not had any change to the
8 undertaking itself by the Ministry's terms and
9 conditions and for that reason I submit that the motion
10 should be dismissed.

11 I might also add that I support Mr.
12 Lindgren fully in his comments on what the effect of
13 granting this motion would be and the nature of the
14 process. I submit it would have a chilling effect on
15 the possibilities for negotiation and compromise in the
16 context of complicated and long hearings because the
17 longer the hearing goes on, if Mr. O'Leary is correct,
18 the longer the hearing goes on the less incentive a
19 proponent would have to agree to any changes in its
20 methodology for fear of those being characterized as
21 changes in its undertaking and with the resulting delay
22 or, in fact, need for a new hearing.

23 I submit that for public policy reasons
24 is exactly the opposite result of what you want to
25 achieve. I think you want to in your ruling on this

1 motion and in any rulings foster negotiation and
2 compromise, and I submit you have done that in the past
3 with the requirement of terms and conditions for,
4 again, the very reasons Mr. Lindgren has stated and I
5 submit that you should do that in this case and reject
6 the motion because it, I submit, will have a positive
7 disincentive on proponents to move along in the process
8 and reflect the concerns of other parties.

9 So, as a result, I submit that in fact
10 you should dismiss this motion for the reasons that we
11 do not have a change in the undertaking. We may have
12 changes to the methodology, but for almost identical
13 reasons to those indicated by Mr. Justice Saunders and
14 the other Board members in the Hydro case, the DSP
15 case, that is not sufficient to warrant any form of
16 relief that is now being sought by my friends.

17 Subject to any questions you may have,
18 those are my submissions.

19 MADAM CHAIR: Thank you, Mr. Cassidy.

20 Mr. Baeder?

21 MR. BAEDER: Thank you.

22 As my friend, Mr. Cassidy, I do note that
23 the hour is late. I also note that we are fastly
24 approaching April Fool's Day. On that basis I will be
25 quite brief with respect to the position I take.

1 As the parties who have gone before me, I
2 agree that this motion should be dismissed. However,
3 what I would draw your attention to is to in fact this
4 Board's jurisdiction and the jurisdiction of this Board
5 with respect to the environmental assessment, as the
6 Board is well aware of, is set out under Section 12,
7 subsection (2) of the Environmental Assessment Act. If
8 I may just read it to you that:

9 "Where there is a hearing where the
10 matter has been referred by the Minister
11 to the Board to hold a hearing the Board
12 has jurisdiction to approve an
13 undertaking..."

14 And the key words here are:

15 "...subject to such terms and conditions
16 that it deems to be appropriate."

17 Now, if one looks at the definition
18 sections under the Environmental Assessment Act there
19 is a difference between an environmental assessment and
20 an undertaking. Environmental assessment is that which
21 is proposed by the proponent and it is set out in
22 Section 5, and I won't take you to it, but it is set
23 out what that environmental assessment must contain.
24 Nowhere when you go through Section 5 does it say that
25 the proponent must set out in the environmental

1 assessment terms and conditions.

2 However, we are dealing with a very
3 sophisticated Proponent and it is a Proponent that is
4 well aware of the jurisdiction of this Board, well
5 aware that this Board has a jurisdiction to impose
6 terms and conditions.

7 As a result, this Proponent anticipated
8 as an alternative to its assessment is suggesting terms
9 and conditions, terms and conditions that the Board has
10 jurisdiction to impose.

11 There is nothing in the legislation which
12 says: Before this Board is to consider terms and
13 conditions it must give to the public as opposed to the
14 parties to the proceedings notice of what it intends to
15 do. In other words, what I am suggesting is that after
16 hearing the entire evidence this Board would be free to
17 reject the proposal, to approve it subject to terms and
18 conditions provided that is an evidentiary basis upon
19 which the Board can make that decision. That is
20 something that arises by way of the evidence heard
21 before the Board.

22 Now, if in fact that evidence arises as a
23 result of agreements between parties, in my respectful
24 submission, it matters not a wit. The jurisdiction of
25 this Board is still confirmed.

1 As has been pointed out by others before,
2 by Mr. Martel you are not bound by any terms and
3 conditions suggested by the parties. You are free to
4 reject those terms and conditions.

5 The legislature has reposed in you that
6 jurisdiction and if, in fact, given this kind of
7 complex hearing - and I don't know of any hearing
8 commenced when this hearing commenced that has been as
9 long and as complex as this hearing, but it is now
10 being mirrored uptown with DSP - it wouldn't surprise I
11 don't think anybody. It wouldn't surprise the public
12 of Ontario, nor do I think it would surprise the
13 justices who sit in Osgoode Hall that in order to
14 facilitate an end to the process, a meaningful end to
15 the process that this Board has decided to look upon
16 favourably or otherwise terms and conditions that have
17 been negotiated between parties.

18 There must be an end. The whole process
19 was undertaken for the purpose of an end in mind. If
20 in order to get there the Board is mindful and is
21 considerate in considering terms and conditions that
22 parties have been able to suggest to the Proponent and
23 the Proponent in its wisdom, having reviewed them,
24 finds and believes that it can still live with its
25 proposals subject to those terms and conditions and

1 provided the Board in exercising its independent
2 judgment finds that those terms and conditions are ones
3 that it can agree to, then where is the prejudice?
4 Where is the prejudice?

5 There is no prejudice to the parties. I
6 dare say there is no prejudice to the public of Ontario
7 and probably the public of Ontario would owe you a
8 great deal in order to be able to solve this very
9 complex problem.

10 Given everything that I have heard here
11 in terms of the process by which this Board reproduces
12 and makes available its proceedings all over Ontario,
13 it is inconceivable that there would be anybody out
14 there who is interested in this process who would not
15 have an opportunity to follow it, living in Dryden or
16 living here in Toronto. In Toronto by perhaps
17 appearing, in Dryden by perhaps reading the
18 transcripts.

19 Nor should we dismiss the fact that the
20 parties themselves and in particular this Applicant, as
21 I heard it when I was here, has an ability to go to the
22 public. It is advocating a position here that it is
23 advocating to the public. It is disseminating a
24 position and I believe from the evidence I heard has
25 disseminated a position to the public. Not only just

1 to the public it represents, those members of the
2 Coalition, but it is advocating to the members of the
3 public of Ontario a particular frame of reference that
4 it sees, it believes should be incorporated. Again,
5 another means for disseminating what in fact is going
6 on here.

7 It would be hard to imagine, given the
8 length of these proceedings and the extent to which
9 this Board has gone in its notice to ensure that the
10 public is informed, that there would be somebody out
11 there who if interested would not have had an
12 opportunity to familiarize himself or herself with what
13 is going on and then have an opportunity to appear
14 before this Board either in Toronto or in the centres
15 where the Board has gone.

16 Given all of those circumstances I can't
17 imagine a more public hearing that has been carried on
18 in this province and for those reasons, in my
19 respectful submission, firstly, I don't believe that
20 the undertaking has changed. The undertaking is timber
21 management.

22 In any event, the changes that are being
23 suggested as negotiated between the parties of which my
24 client has a great stake in this are matters that do
25 not fundamentally change the process or fundamentally

1 change the nature of the undertaking and hopefully at
2 the end of the day may see themselves in an approved
3 undertaking.

4 In my respectful submission it seems to
5 me that after four and a half years of hearings it is
6 somewhat unusual to hear at this time that there could
7 possibly be somebody in this province that may well
8 have been prejudiced by virtue of the fact that that
9 individual has not been able to have the opportunity to
10 follow what is going on and to make his or her views
11 known to this Board.

12 On that basis and in my respectful
13 submission the motion should be dismissed.

14 Thank you.

15 MADAM CHAIR: Thank you, Mr. Baeder.

16 Ms. Seaborn?

17 MS. SEABORN: Madam Chair, one of the
18 benefits of going last in these types of applications
19 is that I think I can proceed very quickly.

20 Mr. Freidin has outlined to you the law
21 and gone through the cases that were provided to you by
22 Mr. O'Leary and distinguished those cases on their
23 facts, and I certainly adopt his submissions in those
24 regards.

25 Mr. Lindgren has pointed out to you the

1 provisions of the original notice that was issued back
2 in March of 1988 and I won't then deal with that matter
3 either.

4 Mr. Cassidy dealt with the important
5 aspects of the ruling that was released yesterday by
6 the Environmental Assessment Board panel hearing the
7 demand/supply plan application, so I won't deal with
8 that.

9 I must say, Mr. Cassidy, I was at an
10 advantage given that Mr. Campbell and Ms. Harvie who
11 have appeared on this hearing argued that application
12 for Ontario Hydro. So I was quite delighted when Ms.
13 Harvie phoned me last night at home and said that they
14 had just received the decision from the Board late
15 yesterday afternoon.

16 Mr. Baeder has dealt with the issue of
17 Section 12(2) which I think is an important issue and I
18 would adopt and support his submissions in that regard.
19 He makes a very good point with respect to the
20 imposition of terms and conditions.

21 The position of the Ministry of the
22 Environment is set out in our three-page submission
23 which was provided to the parties and the Board late
24 this afternoon. I would ask the Board to adopt and
25 rely on those submissions in coming to their decision

1 with respect to this application.

2 The only matter that I did want to deal
3 with was the content of the terms and conditions dated
4 January 6, 1992, which really appear to have, based on
5 the Notice of Motion, triggered this application.

6 I think it should be remembered by the
7 Board that it was as early as 1988 that the Board first
8 ordered the Proponent and the other parties to consider
9 or to in fact go ahead and file with the Board terms
10 and conditions. These terms and conditions have
11 evolved. The OFAH has itself filed two sets of terms
12 and conditions and during their evidence indicated that
13 they would be again revising those terms and conditions
14 at the conclusion of their case.

15 Even Since January 6th, 1992, my client,
16 the Ministry of the Environment, has filed a response
17 to MNR's terms and conditions. Terms and conditions
18 have been filed now by Forests for Tomorrow and by the
19 OFIA and by the Ontario Professional Foresters'
20 Association.

21 Again, this was an agreement that the
22 major parties to this hearing reached during the
23 negotiation process as reflected in Mr. Illing's Report
24 which has been filed as Exhibit 2031 to these
25 proceedings and that agreement was the parties would

1 then go ahead and respond to MNR's revised proposals
2 and file their terms and conditions.

3 Of course, the purpose of these terms and
4 conditions is to try and give the Board a sense of
5 where the parties are in agreement and what issues
6 remain outstanding as between the parties.

7 I would adopt all the submissions made by
8 the counsel before me that that is -- the purpose of
9 these terms and conditions is to narrow those issues
10 and to try and make the Board's decision easier.

11 I accept the Board's proposition that
12 they don't have to accept any terms and conditions, but
13 in the event that they choose to adopt terms and
14 conditions that are proposed by the various parties,
15 obviously the extent to which the major parties to the
16 hearing as a practical matter agree on certain aspects
17 of the Proponent's application, that, I would submit,
18 at the end of day in final argument is a significant
19 factor and I think the best example of that are the
20 terms and conditions that have been reached between Mr.
21 Baeder's clients and MNR and the Industry and have been
22 adopted by my client in our recent terms and conditions
23 with respect to a native consultation process.

24 Subject to any questions the Board may
25 have those are my submissions.

1 MADAM CHAIR: Thank you very much, Ms.
2 Seaborn.

3 Perhaps one question that is raised in my
4 mind by the comments of Mr. Colborne and Mr. Lindgren
5 and that is to the effect that they might have wanted
6 to support this motion because of the possible
7 consequence of intervenor funding becoming available to
8 parties at this hearing under whatever form that would
9 take.

10 Has there been any discussion by your
11 client with respect to the status of any more
12 intervenor funding becoming available for parties to
13 this hearing?

14 MS. SEABORN: Not that I am aware of at
15 this time. As the Board is aware, I think two, if not
16 three, orders-in-council have been issued throughout
17 with respect to intervenor funding. It has been an
18 independent panel of yourself that have heard those
19 applications and, obviously, based on information that
20 has been before the particular funding panel they have
21 made their decision with respect to the funding.

22 In terms of future funding, I can't make
23 any submissions or provide you with any information at
24 this time. If I receive any instructions to advise the
25 Board otherwise I will certainly do so at the earliest

1 possible time.

2 MADAM CHAIR: Thank you, Ms. Seaborn.

3 Mr. Beram, do you wish to make a
4 submission?

5 MR. BERAM: I will at this time take the
6 unusual step of speaking on the record as Board
7 counsel, Madam Chair. I will do this in full knowledge
8 of the ire that I am probably earning by protracting it
9 further. Just give me a moment.

10 MR. O'LEARY: Point of clarification,
11 Madam Chair. I understand Mr. Beram's position here is
12 one of advice and counsel, but if he is going take a
13 public position on the record I wonder whether it is
14 then appropriate for him to also be included in your
15 deliberations in respect of the motion or whether that
16 might somehow exempt him from the process now that he
17 is an active litigant in the matter and an advocate
18 rather than counsel.

19 MR. BERAM: If I could just respond to
20 that. I intended simply to elicit some clarification
21 of a point that was brought up and dealt with that I
22 would submit somewhat inadequately by my friend Mr.
23 O'Leary.

24 At this point I am not yet prepared to
25 formulate what my specific advice would be to the

1 Board, if it is in fact asked of me. If it is, as has
2 been the ongoing policy of this hearing, that advice
3 will be made known to all parties, certainly including
4 Mr. O'Leary.

5 Does that answer your concern?

6 MR. O'LEARY: My concern is just a
7 separation of powers, if we can call it that, is the
8 fact that if you are now going to make submissions in
9 respect of this motion somehow the objectivity of Board
10 counsel is lost.

11 I would have to say to my clients that
12 the process where Board counsel has made submissions in
13 respect of a motion, which might be considered
14 adversarial in nature, is in question now that that
15 same counsel is also one that is giving counsel to the
16 panel members. I do have some concern.

17 MADAM CHAIR: Well, Mr. O'Leary, the
18 Board is perfectly willing to accept your objection.

19 I think the feeling was if there was a
20 point of clarification that would be useful for you to
21 hear from Mr. Beram before he gives us any advice. If
22 you did want to hear that particular matter, that's
23 fine; if you don't, then Mr. Beram's advice will be
24 provided to all parties at the same time.

25 MR. O'LEARY: Is the point of

1 clarification a question as to what is our position? I
2 am certainly prepared to respond to that.

3 MADAM CHAIR: Do you have a question, Mr.
4 Beram? I thought it was a question.

5 MR. BERAM: It can be boiled down to that
6 and it will be quite brief. If I may be permitted to
7 place it on the record, I will say this as succinctly
8 as possible.

9 The relief that the Notice of Motion
10 seeks in paragraph (c) includes a statement with
11 respect to the Intervenor Funding Project Act. The
12 relief specifically calls for what Mr. O'Leary refers
13 to as a new notice of public hearing.

14 The question arises as to how that
15 mechanism, a new notice of public hearing, can overcome
16 the words or the expressed words contained in the
17 provision of Section 15 of the Intervenor Funding
18 Project Act. What I seek is clarification of the legal
19 basis whereby there is a reconciling of how a new,
20 which one might take to mean a subsequent notice of
21 public hearing, will qualify as being what Section 15
22 calls for and what I would paraphrase as a first notice
23 of public hearing.

24 It is my concern that if the Board is
25 asked to issue a new notice of public hearing and then

1 is asked to make a statement which, as the Notice of
2 Motion requests under (c), subparagraph 2, a statement
3 that:

4 "An intervenor to the proceeding may
5 apply to the Board for intervenor funding
6 under the Intervenor Funding Project
7 Act."

8 MR. O'LEARY: I will respond to that,
9 yes.

10 MR. BERAM: Is that fair enough?

11 MR. O'LEARY: I will respond to that in
12 reply.

13 MR. BERAM: It was my hope that you might
14 do that.

15 If I could further clarify the point. It
16 is my concern as a matter of law that the
17 interpretation that you seem to be giving is that the
18 wording of Section 15 of the Intervenor Funding Project
19 Act must be so narrowly construed as to equate to
20 vesting this Board with the jurisdiction which is in
21 fact the jurisdiction given to the minister under
22 Subsection 12(2) of the Environmental Assessment Act.

23 If that one question can be responded to
24 that will certainly clarify the only concern that I
25 have at this point and will enable me to formulate any

1 advice that I have for the Board. Of course, as I just
2 mentioned, that advice will be made open to Mr. O'Leary
3 and all the other parties to this hearing.

4 MADAM CHAIR: Thank you, Mr. Beram.

5 MR. BERAM: That's all I have to add to
6 that.

7 MADAM CHAIR: Thank you.

8 MR. COLBORNE: Excuse me, Madam Chair.
9 Just before Mr. O'Leary begins, I think it is proper
10 for me to make this point now because he is about to
11 reply.

12 I discussed this with Ms. Seaborn and she
13 agrees that something she said might not have been
14 quite complete so I just want to complete it. She did
15 refer to the fact that the funding matter is being
16 dealt with by another panel of this Board and have
17 been.

18 She did not mention something that you
19 may be well aware of, and I'm sure that is the case,
20 and that is that the panel dealing with funding was
21 given in these orders-in-council that Ms. Seaborn
22 referred to a fixed capped amount and the funding panel
23 then had to allocate that.

24 One might have thought from Ms. Seaborn's
25 comment that the matter had proceeded before the

1 funding panel in a manner similar to the way it is
2 dealt with under the Intervenor Funding Act.

3 MADAM CHAIR: Thank you, Mr. Colborne.

4 Mr. O'Leary?

5 MR. O'LEARY: Let me start first with Mr.
6 Beram's inquiry.

7 At the beginning today I indicated that
8 some of the urgency of this motion was believed with
9 the proclamation from the Attorney General's office
10 that the Intervenor Funding Act would be extended four
11 more years. That urgency flows out of Section 16(2) of
12 the Intervenor Funding Act.

13 If I could refer you to the factum that
14 the Coalition has filed, which is the thinner of the
15 two documents, page 8, I have set out the specifics of
16 the Intervenor Funding Act and subsection (2) of
17 Section 16 states that:

18 "Proceedings commenced before the repeal
19 of this...shall be taken up and
20 completed as if it had not been
21 repealed."

22 It has now been extended four more years.
23 The concern had been that if these proceedings had not
24 been commenced, then we might be faced with the
25 argument that it is too late. This motion was

1 commenced prior to that time and, therefore, that I
2 believe is a concern that no longer exists.

3 It is Section 15 which is important. It
4 states that:

5 "This part applies only to hearings in
6 relation to which public Notice of
7 Hearing is first given after the coming
8 into force of this section."

9 Part 1 deals with the powers to grant
10 intervenor funding to successful applicants. Part 2
11 deals with, amongst other things, the amendments to the
12 Environmental Assessment Act which granted --

13 MR. BERAM: Excuse me, Mr. O'Leary.

14 Perhaps it is just my copy of the Intervenor Funding
15 Project Act, but it reads:

16 "This Act applies only to hearings in
17 relation to which public Notice of
18 Hearing was first given on or after the
19 1st day of April..."

20 MR. O'LEARY: In either event, the act
21 applies in two sections. There is one that deals with
22 the costs that are granted to the Board, there is an
23 amendment to the Environmental Assessment Act and it
24 has similar terminology which says that:

25 "The Act...or the part...applies to

1 hearings in relation to which public
2 Notice of Hearing is first given after
3 the coming into force of this section."

4 The act was proclaimed in force on April
5 1st, 1989. So your notice which is dated March 1st,
6 1988, the fact that the act came into force on April
7 1st, 1989, has led to the consequence that parties have
8 not been able to apply under the Intervenor Funding Act
9 and this panel does not have the powers that other
10 Environmental Assessment Board panels have presently
11 in respect of awarding costs.

12 The position that the Coalition is taking
13 is that by your issuance of a new notice of public
14 hearing it amounts to the first notice to the public of
15 a hearing into the amended undertaking or environmental
16 assessment, but it is the first notice in respect of
17 the new case the Proponent is putting forward. That's
18 the position and we feel it fits squarely within
19 Section 15.

20 MR. MARTEL: But this panel was, I
21 understand, precluded from taking those matters into
22 consideration.

23 What gives us the authority now to jump
24 in and say: Without an amendment to the act itself you
25 people, in fact, now have the authority to make a

1 decision, to hear it per se?

2 MR. O'LEARY: To hear the application for
3 funding?

4 MR. MARTEL: Yes. What gives us the
5 authority?

6 MR. O'LEARY: The authority is that it
7 states that the act applies in respect of hearings to
8 which public notice is first given after the coming
9 into force of this section or this act.

10 Section 15 came into force on April 1st,
11 1989. If a notice, a new notice of public hearing was
12 sent out and published by the Ministry pursuant to your
13 directions or pursuant to your order, the public would
14 then have been given first notice of the amended
15 undertaking or the amended environmental assessment.

16 Respectfully, it doesn't matter, but
17 that's the first notice. It is a new hearing. It is
18 constituted as a new hearing. That would be the first
19 notice in respect of that new hearing.

20 You are then entitled under your Rules of
21 Practice and Procedure to adopt the evidence that has
22 been led in the hearing that's presently before you,
23 all the oral and written evidence, and this is a common
24 procedure that occurs amongst boards in Canada to save
25 time, to avoid repetition of evidence. So that a

1 proponent doesn't have to repeat matters a Board will,
2 if necessary, reconstitute itself under a different
3 hearing order. It is considered a different hearing
4 from a legal perspective and they will adopt the
5 evidence of a prior hearing to save time, to expedite
6 the matter.

7 It is the Coalition's position that that
8 would fit us squarely within the interpretation of the
9 Intervenor Funding Act and entitle parties to apply for
10 funding and also for the Board to award costs.

11 That's one aspect of the case and it
12 appears that that's the only one that I have been able
13 to convince any of my friends that there is some
14 prejudice in the failure of sufficient funding for the
15 Coalition.

16 Fortunately, your decision will not be
17 made on the basis of a show of hands. This is not a
18 democratic institution. This is a quasi-judicial body.
19 One where the rule of law and statute apply. It is one
20 where the rules of natural justice, which is the legal
21 position that we are presenting and submitting, it is
22 one that is jealously guarded by the courts for fear
23 that what might take place behind closed doors, what
24 agreements might be worked out between the parties
25 conveniently without notice to the citizens of Ontario,

1 some might say behind their backs without notice, that
2 these things don't happen.

3 Now, Mr. Lindgren took us to the notice
4 that was given and that is contained, a copy of it is
5 contained under Tab 4 of the factum the Coalition has
6 filed. This is an important document. It is important
7 because a court is going to ask itself: Is this notice
8 sufficient for the purposes of advising the citizens of
9 this province and the parties that wanted to
10 participate in this hearing of the case that they were
11 going to have to meet. Is this enough for a reasonable
12 person to say: Yes, as of this date I could have
13 expected what would have happened.

14 Well, Mr. Freidin admitted that the
15 public could not know that, that they couldn't
16 anticipate the multitude of changes in the state that
17 we are presently in.

18 Looking at the notice:

19 "The purpose of the class environmental
20 assessment is to obtain approval for this
21 undertaking."

22 The Class EA contains a planning
23 procedure, a planning procedure. The environmental
24 assessment document, that is what's given to the
25 public. The MNR is saying: Here is our planning

1 procedure. We want to hear from you. Give it to the
2 Ministry of the Environment, have a review conducted,
3 we want to hear from you. The public can review the
4 Ministry's review of that. That's what they are
5 telling the public and what we have today is a
6 completely different document.

7 It is not the planning procedure they
8 told the public they were going to be putting to you
9 for a decision about approval and acceptance. They
10 said that it is this planning procedure in 1987 that
11 will ensure the environmental effects and public input
12 will be considered in the planning and implementation
13 of all timber management plans in Crown lands in
14 Ontario. It is the one in 1987 which was the basis of
15 the notice in 1988. It is not the present concoction.

16 Now, that has to be contrasted with --
17 going back one further point on page 3 of that
18 document. The notice specifically that's given to the
19 public, the bottom of page 3, is that copies of the
20 class environmental assessment, the government's review
21 of the Class EA and a detailed map of the area of the
22 undertaking and any notices will be made available.

23 They are being told that this is the
24 planning process, the procedure. This is the way we
25 are going to do things. That's not the way they are

1 proposing they are going to do things. In fact, there
2 has been some sweetheart deal cooked out, is what the
3 very argument I am concerned somebody will make to the
4 judges some point and that would be accepted and this
5 whole hearing all for not.

6 If I could turn you next to the case that
7 my friend Ms. Seaborn has brought to your attention.
8 That's the recent decision in the Hydro environmental
9 assessment and that's found under Tab 4 of the
10 materials that were filed on behalf of the Ministry of
11 the Environment.

12 Mr. Cassidy also took you to page 8 and I
13 would refer you there as well because what needs to be
14 completed is the balance of the paragraph to which Mr.
15 Cassidy referred you to. He read you quite correctly
16 that:

17 "The proposed changes incorporated..."

18 This is paragraph No. 2.

19 "The proposed changes incorporated in
20 Exhibit 452 are significant, but in our
21 view are of a nature contemplated by the
22 DSP."

23 The DSP, if you go back to the beginning,
24 is the document that began it all. It is the
25 environmental document. You will see it is defined,

1 the demand/supply, Exhibit No. 3. Presumably much the
2 same as Exhibit No. 4 in this; the environmental
3 assessment document. The genesis of the entire
4 hearing. I continue:

5 "The planning methodology has changed
6 because of a perceived change in the
7 uncertainty of future need."

8 I continue:

9 "The approvals now sought were all
10 requested in the DSP. The changes that
11 Ontario Hydro is now asking for approval
12 for less new hydraulic supply and no
13 longer requests approval for nuclear or
14 fossil supply."

15 So it is saying it anticipates less a
16 need. It is saying we don't need as much anymore. It
17 is not adding something on. It is not asking for more,
18 as Mr. Freidin had admitted they have done. Their
19 major changes that they are so proudly flaunting before
20 us. They, in his own words, mean they are adding more.

21 I continue:

22 "The major supply approvals have been
23 removed from what are said to be timing
24 reasons."

25 The Board states:

1 "The DSP anticipated that such a change
2 might occur."

3 It is set out right in the very
4 environmental assessment document that gave rise to the
5 hearing. This is the thing that the people of Ontario
6 would have looked at and this is the portion that the
7 Board is relying upon and they refer to a particular
8 section.

9 So the public had notice that there might
10 be a change, and in this case one where they are going
11 to say: We don't need something. We don't need to
12 proceed with as an extensive undertaking in the future
13 as presently, but the important point is that it was
14 set out in the documents which were made available to
15 the public through the notice and ultimately it is the
16 notice that the courts will look at to determine if
17 there has been sufficiency.

18 The analogy or the simile that might be
19 appropriate is that of a footprint. If what the MNR is
20 now asking for is outside the footprint left by the
21 notice, if it is outside the scope of that footprint,
22 then the courts will step in and decide to review the
23 matter and, unfortunately, there seems to be a
24 predisposition to completely quash it because they are
25 bound by law, the rules of common law and by law under

1 the Statutory Powers Procedure Act.

2 It is unfortunate because so much time
3 and expense will have been lost and that's the real
4 prejudice. Not just to the Coalition, but to the other
5 parties to this proceeding and that understandably is
6 why they are here today to hear this motion.

7 But what concerns me is the position that
8 has been taken by the Ministry in respect of, in
9 effect, Mr. Freidin saying that you have two options.
10 Dismiss the motion of the Coalition's or to find the
11 notice defective and quash -- in effect, quash the
12 hearing, send it back for another review and start all
13 over again.

14 With respect, I don't think that is
15 necessary. There seems to be jurisdiction within the
16 act and certainly under the Statutory Powers Procedure
17 Act for you to issue a new notice of public hearing and
18 for this hearing to be reconstituted in a new hearing
19 form, but adopting the evidence that you received to
20 the present time.

21 The question that comes to mind is, what
22 is all the fuss about. The Coalition is not asking
23 that this hearing be quashed. We are not asking for it
24 to start again. We are not asking the Ministry to not
25 in the future suggest amendments which may be major and

1 of a material basis, but we are asking that the legal
2 requirements incumbent on this Board be followed for
3 fear that by not doing so the entire hearing may be
4 lost.

5 The purpose of a public hearing is to see
6 that the public participates. There has been such a
7 change between what was given to the public and what is
8 presently involved in this hearing where I have seen in
9 my few weeks here no participation other than the
10 parties who have been able to muster up sufficient
11 funds to last the four and a half years.

12 MADAM CHAIR: Excuse me, Mr. O'Leary.
13 You know that we have heard from over 700 individuals
14 with respect to oral submissions.

15 MR. O'LEARY: I understand that and, as I
16 said in my earlier submissions, it is unquestioned that
17 parties and others will say that every attempt has been
18 made to allow parties to involve themselves in this
19 hearing at whatever time was convenient to them, but
20 this is common to most hearings of this nature.

21 The point is that the notice that was
22 given is a legal requirement. The best of intentions
23 to make whatever we have been doing for past four years
24 available to parties is not sufficient from a legal
25 point of view and that's where the danger is, that the

1 procedures -- or that the notice will fail and the
2 courts will overturn it.

3 I thank Mr. Freidin for being candid and
4 drawing your attention to the southwestern Hydro case
5 which indicates that in reality, even if the
6 transcripts were made available for citizens of this
7 province, they would still be prejudiced and that's an
8 admission that is important from our point of view.

9 The important point is ensure that the
10 public has been given adequate notice of what a
11 Proponent is proposing and it is respectfully submitted
12 that - and there has been little argument - it will
13 result in significant delay by so issueing a further
14 hearing notice.

15 The argument has been related
16 predominantly to distinguishing the cases that have
17 been produced on behalf of the Coalition and the facts
18 of this case.

19 I come back to that analogy I suggested
20 earlier where it is going to be Mr. Freidin on behalf
21 of the MNR trying to explain to a panel of the
22 Divisional Court that he didn't mean major changes and
23 today he had admitted they are major changes and they
24 are proud of them, but what he means by major changes
25 doesn't mean that we have amended either his

1 environmental assessment or the undertaking and it
2 matters not whether you call it the undertaking is
3 amended or the environmental assessment.

4 The point is, the case has changed, the
5 public has not been given notice of the case that's
6 presently before you for approval and the parties to
7 this hearing, such as the Coalition, has been
8 prejudiced by reason of the fact that there was no way
9 that they could anticipate that they would be here at
10 this point four and a half years later trying to meet a
11 case which is presently before you for approval.

12 That in a summary, in a nutshell, are the
13 respectful submissions of the Coalition and subject to
14 any questions I will sit down.

15 MADAM CHAIR: Thank you very much, Mr.
16 O'Leary.

17 I suppose we have one question and that
18 is, to what extent does a panel, a tribunal such as Mr.
19 Martel and I -- when you conduct any sort of a hearing,
20 in particular a long one, the question of whether it is
21 being conducted fairly and whether you are doing
22 everything to make it a legal -- you know, you are
23 respecting all the legal obligations that are on you as
24 a decision-maker is something that you go through every
25 day and whatever decisions you make and however you

1 receive evidence and digest it and so forth, you are
2 always concerned about that, and certainly involving
3 the public in this hearing has been of utmost concern
4 to Mr. Martel and myself.

5 I supposed we could have gone through the
6 last four years every day making decisions that would
7 be favourably reviewed by Divisional Court. I suppose
8 we could have sat down every day and thought: Well,
9 gee, this is the best decision to make, but we are
10 going to make this one because we are worried that we
11 will be reviewed and we will be found out to have made
12 a mistake or we would be made to look silly or whatever
13 and that hasn't been a concern of this panel.

14 Our decisions have been made with respect
15 to making sure that everyone has been fairly treated at
16 the hearing, that everyone has been given as much
17 notice as we think could possibly have been given at
18 every step, but we never stop worrying about those
19 kinds of considerations which is why we are content to
20 give you as many hours as you need to impress upon us
21 whether we are making some kind of an error that we had
22 just never realized before.

23 We will continue to do that until the
24 last day of the hearing, but I guess the question is,
25 is the best decisions to be made by panels such as

1 ourselves to be ruled by what a court might do with
2 respect to this decision at the end of the day?

3 MR. O'LEARY: Well, Madam Chair, again I
4 don't want to presuppose and advise you what your
5 decision should be.

6 I am making submissions on behalf of the
7 Coalition. It is our submission that it is an
8 appropriate time now to make such a decision, but it is
9 respectfully submitted that as the hearing proceeds and
10 motions such as this are brought it is appropriate to
11 have one eye on the hearing and another eye on what
12 ultimately would be the ramifications of not accepting
13 the relief or granting the relief sought in this
14 particular instance.

15 If at some point down the road after this
16 hearing is concluded, if you decided not to grant the
17 relief sought and you made a decision and a party was
18 to come forward, hypothetically one of the arguments
19 that would be raised was that Mr. O'Leary raised it
20 back on March 31st, 1992, and at that time there was an
21 argument made and there was a lengthy motion in respect
22 of whether the notice was sufficient in this hearing
23 and the relief wasn't granted.

24 That argument would be put forth and
25 reference to this particular motion would be put forth

1 in support of a motion to quash the entire hearing. I
2 think that is what as a lawyer you would say to the
3 court as part of your responsibilities to your client.
4 That's the best I can respond to that.

5 MR. MARTEL: Could you just answer one
6 brief question for me, Mr. O'Leary. Just of interest
7 to me, quite frankly.

8 How many parties received notice of your
9 motion of the 56 parties to this hearing and seven or
10 eight them full time? Did they all get notice?

11 MR. O'LEARY: Mr. Martel, as I have
12 indicated to Mr. Beram earlier, we gave notice to the
13 full-time parties in attendance.

14 MR. MARTEL: I just asked.

15 MR. O'LEARY: Fair enough. If that had
16 been perceived as a problem I was prepared to adjourn
17 the motion to a date and give notice to all the
18 parties, but what we are saying is that at law there is
19 an obligation on tribunals, quasi-judicial tribunals
20 such as this one, to give notice which is sufficient,
21 reasonable at law and a failure to meet that could
22 result in very drastic consequences.

23 It is a decision what while certainly
24 others may have wanted to participate, it is a matter
25 that needs to be faced squarely and recognized as being

1 a requirement of law.

2 MADAM CHAIR: Well, I don't think we have
3 any more questions. We are certainly going to consider
4 your motion very seriously. We don't make rulings on
5 the basis of a show of hands and, in fact, we have
6 predicted from day one that no one will be supportive
7 of our final decision. I am quite sure we will be very
8 unpopular and disputed by all the parties involved in
9 this hearing and the public at large.

10 I don't think that Mr. Martel and I have
11 ever given any consideration to making decisions on the
12 basis of what people might want versus what is the most
13 responsible decision to make.

14 MR. O'LEARY: If that was the impression
15 that I left in my comment, that wasn't directed at the
16 panel. That was directed at my friends around me.

17 MADAM CHAIR: We will take away
18 everything you have said and the other parties have
19 said to us and we will endeavor to get out a ruling as
20 quickly as we can.

21 We are in North Bay for the next three
22 weeks, but we will do our best to get out a ruling as
23 quickly as we can. We thank you for bringing this to
24 our attention.

25 Thank you, and we will see you in North

1 Bay next week.

2
3 ---Whereupon the hearing was adjourned at 10:10 p.m.,
4 to be reconvened Tuesday, April 7, 1992, at the
5 Empire Hotel in North Bay, Ontario commencing at
6 2:00 p.m.
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25 MC [C. copyright 1985].



